IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD, *Petitioner*,

v.

BOWIE K. KUHN, ET AL., *Respondents*

INDEX

	Page
Docket Entries	1
Complaint	6
Exhibit A thereto: Uniform Player's Contract	19
Exhibit B thereto: Notice of Transfer	35
Exhibit C thereto: Ltr., Devine to Flood	36
Exhibit D thereto: Ltr., Flood to Kuhn	37
Exhibit E thereto: Ltr., Kuhn to Flood	38
Answer of Defendant Kuhn	39
Answer of Defendants Feeney et al.	44
Opinion denying preliminary relief, March 4, 1970	54
Opinion providing early trial, March 25, 1970	83
Opinion denying dismissal in part, April 23, 1970	83
Opinion after trial, August 12, 1970	95
Final Judgment	122
Notice of Appeal	123
Opinion of the Court of Appeals, April 7, 1971	125
Judgment, May 12, 1971	141
Plaintiff's Witnesses	
Testimony of Clarence S. Campbell	232
Testimony of Robert A. Eagleson	230
Testimony of Curtis G. Flood	142
Testimony of Henry Greenberg	173

	Page
Testimony of J. Walter Kennedy	222
Testimony of Marvin J. Miller	154
Testimony of Marvin J. Miller (recalled)	187
Testimony of Robert R. Nathan	193
Testimony of Jack R. Robinson	169
Testimony of Alvin R. Rozelle	213
Defendants' Witnesses	
Testimony of John Clark, Jr.	326
Testimony of Francis L. Dale	290
Testimony of Charles S. Feeney	280
Testimony of John J. Gaherin	326
	[489]
Testimony of Ewing M. Kauffman	325
Testimony of Bowie K. Kuhn	242
Testimony of John J. McHale	301
Testimony of Robert A. Reynolds	304
Plaintiff's Rebuttal	
Testimony of Marvin J. Miller	364
Testimony of Bill Veeck	384
Defendants' Sur-Rebuttal	
Testimony of John J. Gaherin	400
Trial Exhibits	
Def. Kuhn's Exhibit A: Stipulation	407
Def. Feeney et al.'s Exhibit N: Clubs' Proposed Amended Agreement	418
Def. Feeney et al.'s Exhibit O: Players Association Statement of Policy, July 28, 1967	447
Def. Feeney et al.'s Exhibit P: Ltr., Miller to Gaherin	456
Def. Feeney et al.'s Exhibit R: Players Association Proposed Amendments and Additions	457
Def. Feeney et al.'s Exhibit Q: Joint Study	462
Def. Feeney et al.'s Exhibit S: Arthur D. Little economic analysis	473
Defendants' Witnesses (continued from page 326)	
Testimony of John J. Gaherin	489

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Docket Entries

Date	*Proceedings*
Jan. 16-70	Filed complaint and issued summons.
Jan. 6-70	Filed Order appointing Edward Sutton to serve summons and complaint. Clerk—mn
Jan. 19-70	Filed Pltff's. notice of motion order to show cause re preliminary injunction ret 1/20/70.
Jan. 19-70	Filed Pltff's. memorandum in support of motion.
Jan. 21-70	Filed Affidavit of Service of summons and complaint. Served: Charles S. Feeney, Joseph E. Cronin, John J. Gaherin on 1/16/70, Bowie K. Kuhn on 1/16/70.
Feb. 2-70	Filed Affidavit of Bowie K. Kuhn.
Feb. 2-70	Filed Memorandum of deft. Bowie K. Kuhn in opposition to Pltff's. motion for pre. injunction.
Feb. 2-70	Filed Affidavit of Joseph E. Cronin.
Feb. 2-70	Filed Memorandum in opposition to Pltff's. motion for pre. inj.
Feb. 3-70	Filed Notice of Volunary Dismissal as to Baltimore Baseball Club, Inc. (filed in court).
Feb. 3-70	Filed (in court) Reply Affidavit.
Feb. 6-70	Filed Plaintiff's Reply Memorandum in support of motion for pre. inj.
Mar. 4-70	Filed Opinion #36600. Cooper, J. * * * Accordingly, we are constrained to deny plaintiff's motion for the extraordinary remedy of a preliminary injunction.

Docket Entries

Date	*Proceedings*

As a matter of law, we are powerless to hold otherwise. So ordered. (mailed notice)

Mar. 13-70—Filed order referring this action to Hon. Irving Ben Cooper for All Purposes. Sugarman, Ch.J.

Mar. 19-70—Filed deft Bowie K. Kuhn Notice of Motion.

Mar. 25-70—Filed Notice of Settlement Unsigned, with Memo, End. * * * We see merit in, and accordingly grant, the application. Date for trial to be fixed after consultation with counsel in the case. So ordered. Cooper, J. (mailed notice) (returned to Cooper, J.)

Apr. 23-70—Filed Memorandum of deft. Bowie K. Kuhn in support of motion to dismiss.

Apr. 23-70—Filed Memorandum in support of defts'. motion to dismiss the first four alleged causes of action.

Apr. 23-70—Filed Memorandum in support of motion by defts. St. Louis and New York Yankees Clubs to dismiss the fifth cause of action.

Apr. 19-70—Filed Notice of Motion re: dismiss First Cause of Action.

Apr. 23-70—Filed Notice of Motion re: Dismiss the 5th Cause of action.

Apr. 23-70—Filed Notice of Motion re: Dismiss 1st, 2nd, 3rd and 4th causes of action.

Apr. 23-70—Filed Opinion #36726. In summary, for the reasons set forth, defendants' motions to dismiss Pltff's. first four causes of action which contest the legality of baseball's reserve system are deferred until the trial; defendants' motion for summary judgment in favor of defts. St. Louis National Baseball Club, Inc. and New York Yankees, Inc. on both claims of plaintiff's fifth cause of action is granted. This shall be considered an order. Settlement thereof is unnecessary. So ordered. Cooper, J. (mailed notice)

Docket Entries

Date	*Proceedings*
Apr. 27-70	Final Judgment. Ordered that defendants St. Louis National Baseball Club, Inc. and New York Yankees, Inc. have judgment against the plaintiff Curtis C. Flood dismissing the fifth cause of action only. Clerk. (mailed notice).
May 4-70	Filed deft. Bowie K. Kuhn Answer to complaint.
May 4-70	Filed Answer of defendants other than Bowie K. Kuhn, to the first alleged cause of action. (returned to Cooper, J.)
May 15-70	Filed Notice of Motion Ret. before Cooper, J. re: produce, before trial.
May 15-70	Filed Plaintiff's Memorandum.
May 15-70	Filed Memorandum of all defts. except Bowie K. Kuhn in opposition to motion.
May 15-70	Filed Memorandum and Order. Pending trial where we may more fully examine the asserted confidentiality and the data produced: We grant deft's application to limit access to the date supplied to as indicated, etc. So Ordered. Cooper, J. (Mailed Notice)
May 19-70	Before Cooper, J. Trial continued.
May 21-70	Trial continued.
May 22-70	Trial continued.
May 25-70	Trial continued.
May 26-70	Trial continued.
May 27-70	Trial continued.
May 28-70	Trial continued.
June 1-70	Trial continued.
June 2-70	Trial continued.
June 3-70	Trial continued.
June 4-70	Trial continued.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 202

CURTIS C. FLOOD, *Plaintiff*,

– against –

BOWIE K. KUHN, Individually and as Commissioner of Baseball, CHARLES S. FEENEY, Individually and as President of the National League of Professional Baseball Clubs, JOSEPH E. CRONIN, Individually and as President of the American League of Professional Baseball Clubs, ATLANTA BRAVES, INC., CHICAGO NATIONAL LEAGUE BALL CLUB, THE CINCINNATI REDS, INC., THE HOUSTON SPORTS ASSOCIATION, LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB LTD., METROPOLITAN BASEBALL CLUB, INC., PHILADELPHIA NATIONAL LEAGUE CLUB, PITTSBURGH ATHLETIC CO., INC., ST. LOUIS NATIONAL BASEBALL CLUB, INC., SAN DIEGO PADRES, SAN FRANCISCO GIANTS' BASEBALL CLUB, BALTIMORE BASEBALL CLUB, INC., BOSTON RED SOX, CLEVELAND INDIANS, INC., DETROIT BASEBALL CLUB, NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., GOLDEN WEST BASEBALL CO., CHICAGO WHITE SOX, KANSAS CITY ROYALS BASEBALL CLUB, MINNESOTA TWINS, INC., OAKLAND ATHLETICS, and PACIFIC NORTHWEST SPORTS, INC.

Defendants.

Complaint

Plaintiff, CURTIS C. FLOOD, by his attorneys Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, alleges:

FIRST CAUSE OF ACTION, AGAINST ALL DEFENDANTS

Jurisdiction

1. This claim arises under the Sherman Anti-Trust Act and the Clayton Anti-Trust Act. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1337.

The Parties

2. Plaintiff is a major league baseball player widely regarded as a skilled and outstanding center fielder. From 1958 through 1969 he played with the St. Louis Cardinals, the team owned by defendant, St. Louis National Baseball Club, Inc.

3. Defendants are the major figures and entities comprising major league professional baseball. Defendant Kuhn is the Commissioner of Baseball. Defendant Charles S. Feeney is President of the National League of Professional Baseball Clubs (hereinafter "National League"), a membership association composed of twelve clubs located in eight states and Canada. Defendant Joseph E. Cronin is the President of the American League of Professional Baseball Clubs (hereinafter "American League"), a membership association composed of twelve clubs located in ten states and the District of Columbia. The other defendants are the major league baseball clubs comprising the two leagues. These clubs are engaged in the business of staging baseball games, transporting players and equipment, purchasing equipment, contracting with television and radio stations, purchasing and selling refreshments and novelties through concessions at baseball stadiums, and other business activities.

Defendants' Involvement in Interstate Commerce

4. Defendants are now engaged in interstate commerce and trade and their activities have a substantial impact on interstate commerce and trade.

5. Defendants engage in interstate commerce, among other ways, in that:

(a) The baseball games staged by the club defendants are broadcast on national radio and television and on local radio and television stations affiliated with national networks. In 1969 defendants collectively derived from all such broadcasts more than $35,000,000.

(b) The staging of baseball games by the club defendants requires substantial travel and communication in interstate commerce and substantial movement of equipment in interstate commerce. The amounts expended by defendants on such travel, communication, and movement exceed $1,000,000 a year.

(c) The staging of baseball games by the club defendants requires substantial purchases of equipment and supplies in interstate commerce. Such purchases by defendants exceed $1,000,000 a year.

(d) In the staging of baseball games, the club defendants sell tickets across state lines, employ agents across state lines, and advertise across state lines. In 1969 defendants collectively derive from box office receipts of baseball games sums in excess of $25,000,000.

(e) In the staging of baseball games, substantial sums are expended in interstate purchases for concession sales in baseball stadiums. On information and belief defendants derive sums in excess of $1,000,000 a year from such concession sales.

(f) In the business of staging baseball games, defendants employ facilities of interstate communication and travel to negotiate, and contract with, television and radio networks and stations, concessionaires, baseball players, managers, umpires, agents, and one another.

6. Defendants' involvement in interstate commerce has increased markedly since 1950. For example, in 1950 box office receipts from baseball exhibitions were almost six times the receipts from national radio and television contracts. By 1969, radio and television receipts had increased to ten times their 1950 levels and exceeded box office revenues. In addition, as described more fully below, since 1953 professional baseball clubs have become more closely involved with other businesses in interstate commerce.

Organized Baseball

7. Defendants, together with more than 125 minor league clubs, comprise an industry and structure commonly called "Organized Baseball". This structure exists and is perpetuated by virtue of various written and tacit agreements among defendants and between defendants and the minor league clubs and leagues.

8. Defendant Kuhn, as Commissioner of Baseball, is the central figure in the structure of Organized Baseball and the chief executive officer of the industry. The Commissioner has sweeping powers and duties, including among others: (a) the power to make binding decisions on disputes between clubs; (b) the power to impose fines and discipline upon the clubs and leagues; and (c) the power to discipline or remove any officer or employee of the club, including a player.

9. Defendants Feeney and Cronin, as Presidents of the two Major Leagues, have the power to discipline clubs, players and umpires. They also have the power and duty to review each club contract with a player, and such player contracts are not effective until reviewed and approved by the respective league presidents.

10. No person, club, organization, league or other entity may enter Organized Baseball without recognizing the Commissioner and submitting to his jurisdiction.

11. All the minor league clubs in Organized Baseball, collectively called the National Association, recognize the office of the Commissioner of Baseball and submit themselves to his jurisdiction. Defendants are further tied to the minor league clubs in that each club defendant either owns, is affiliated with, or has a working arrangement with a number of minor league clubs.

12. In short, anyone who wishes to play professional baseball in the United States, must play on defendants' terms or not at all.

13. Defendants have acquired substantial anticompetitive economic power in other ways. For example, defendant St.

Louis National Baseball Club, Inc. is owned by or affiliated with the company which makes and distributes the only beer sold in the St. Louis ball park. Defendant New York Yankees Inc. is owned by the Columbia Broadcasting System, one of the three major networks that would compete for television and radio broadcasts of baseball games. On information and belief, defendants are engaged in many other monopolistic practices which they have effectively hidden from public view.

14. Defendants are thus engaged in a combination and monopoly in restraint of trade in violation of §§ 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2).

The Reserve System

15. By a series of rules and practices hereinafter collectively referred to as the "reserve system," Organized Baseball has a lifetime grip on any player who wishes to play professional baseball in the United States. From the moment a player leaves the amateur ranks of high school, college or sandlot baseball, the player must play for the team which first "acquires" him or its "assignee."

16. The reserve system works as follows:

(a) The contract which the professional ballplayer must sign with a club is a contract which is required by defendants' rules to be uniform throughout the Major Leagues, and it is not subject to variation, except for compensation, at the instance of any player, including plaintiff. That uniform contract provides, among other things, that the club has the "option" to renew the contract for an additional year after its termination. But each player is required to sign a new contract containing that option every year. If the player fails to sign a contract, the club may unilaterally renew the contract containing the "option clause," and so on, indefinitely. Thus, the so-called "option" is, in effect, a contract for perpetual service.

(b) The uniform contract which each player must sign also provides that the club may "assign" the player, regardless of the player's wishes, to another club, and once so assigned, the player must sign a new uniform contract containing the "option clause."

(c) Each year, each club "reserves" 40 players. While a player is reserved, or while he is under contract to a club, or while a player is on a "negotiation list" of a club, no other club may negotiate with or contract with the player, nor may the player negotiate with any other club. Defendants disguise this practice of binding a player to one team for life under rules prohibiting "tampering."

(d) In addition to the 40 players which a club may "reserve" as described above, a club also has exclusive "rights" to a player—i.e., no other club may negotiate with him nor he with them—while he is voluntarily retired, while he is under suspension, while he is disabled or injured, while he is in military service, and while he is "ineligible," "disqualified" or "restricted." Moreover, if a player fails to contract with "his" club, no other team may negotiate with him, he may not negotiate with another club, and he may be declared "ineligible" to play for any club until "his" club or the Commissioner reinstates his eligibility. These practices are enforced by the disciplinary powers of the Commissioner and the concerted action of the clubs.

17. The net effect of the rules and practices described in paragraphs 15 and 16 is that the player, once he signs with a given club, must play for that club and no other, or must play for a club to which he is assigned by the original club, or to its assignee club, and no other, during his lifetime. Moreover, after his retirement as an active player, the player may not become a coach or manager unless the club which has "rights" to him as a player releases him unconditionally.

18. The reserve system is an unreasonable restraint of trade in violation of §§ 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2).

Plaintiff's Injury

19. Plaintiff Flood has played major league baseball for 14 years. During the years 1958 to 1969 he played baseball for the St. Louis Cardinals, a ball club owned by defendant St. Louis National Baseball Club, Inc. (A copy of plaintiff's 1969 contract, which is a uniform contract, is annexed as Exhibit "A".)

20. By an index card size notice dated October 8, 1969 (annexed as Exhibit "B"), plaintiff was purportedly "assigned" to the Philadelphia Phillies (defendant Philadelphia National League Club). The notice was accompanied by a four-line covering letter (annexed hereto as Exhibit "C"), and plaintiff received a phone call from a club official informing him of the "trade." After playing for the St. Louis Cardinals for a period of twelve years these were the only communications plaintiff received from the Cardinals upon his purported "trade."

21. Plaintiff is ready and eager to play baseball in 1970. By a letter dated December 24, 1969 (annexed as Exhibit "D"), and otherwise, plaintiff has informed the Commissioner and the teams comprising the Major Leagues, that he wishes to play. Plaintiff has also asked the Commissioner, and through him the Major League teams, that he wishes to be declared a "free agent" and would like to conduct negotiations with the various teams for a contract for the 1970 playing season. By letter dated December 30, 1969 (annexed as Exhibit "E"), the Commissioner denied plaintiff's request.

22. Pursuant to agreements among defendants and pursuant to the reserve system, defendants are now engaging in a conspiracy and boycott to prevent plaintiff from playing baseball in the 1970 season, or ever, for any professional baseball club other than the Philadelphia Phillies.

23. This conspiracy and boycott violate §§ 1 and 2 of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2). These vio-

lations are continuing, and, unless equitable relief is granted, will continue and will succeed in causing irreparable damage to plaintiff and the public. Plaintiff has no complete and adequate remedy at law.

24. As a consequence of the conspiracy in which defendants are engaged, and since the date of the Commissioner's letter of December 30, 1969, plaintiff has suffered, and will suffer, damage to his non-baseball business interests, damage to his ability to receive fees and benefits from product endorsement and publicity appearances, and other damages, all in the sum of $25,000. And unless immediate and final equitable relief is granted, plaintiff's baseball career will be effectively terminated by defendants, to plaintiff's damage in the sum of $1,000,000.

SECOND CAUSE OF ACTION AGAINST DEFENDANTS ATLANTA BRAVES, INC., THE CINCINNATI REDS, INC., LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB LTD., METROPOLITAN BASEBALL CLUB, INC., PITTSBURGH ATHLETIC CO., INC., BALTIMORE BASEBALL CLUB, INC., CLEVELAND INDIANS, INC., NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., MINNESOTA TWINS, INC., PACIFIC NORTHWEST SPORTS, INC.

25. Jurisdiction of this claim is based upon diversity of citizenship and is conferred upon this Court by 28 U.S.C. § 1332.

26. Plaintiff is a citizen of the State of Missouri. On information and belief, defendant Montreal Baseball Club, Ltd. is an alien. On information and belief, the other defendants are all citizens of states other than Missouri. The amount in controversy exceeds $10,000, exclusive of interest and costs.

27. Plaintiff repeats and realleges paragraphs 2, 7 through 13, 15 through 17, and 19 through 22 hereof.

28. By the above described arrangements, agreements, and conspiracy, defendants have restrained and are re-

straining trade and plaintiff's free exercise of playing professional baseball in New York, California, and other states, in violation of § 340 of the General Business Law of New York, in violation of §§ 16720 and 16726 of the California Business and Professional Code, in violation of § 2855 of the California Labor Code, and in violation of other anti-trust and anti-blacklisting statutes of the several states in which defendants stage baseball games.

29. Defendants have also violated and are violating the civil rights statutes of the several states in which they stage baseball games.

30. Unless equitable relief is granted, these violations will continue and will succeed in causing irreparable injury to plaintiff and to the public. Plaintiff has no complete and adequate remedy at law.

31. Plaintiff repeats and realleges paragraph 24 hereof.

THIRD CAUSE OF ACTION AGAINST DEFENDANTS ATLANTA BRAVES, INC., THE CINCINNATI REDS, INC., LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB, LTD., METROPOLITAN BASEBALL CLUB, INC., PITTSBURGH ATHLETIC CO., INC., BALTIMORE BASEBALL CLUB, INC., CLEVELAND INDIANS, INC., NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., MINNESOTA TWINS, INC., PACIFIC NORTHWEST SPORTS, INC.

32. Plaintiff repeats and realleges paragraphs 25, 26, 2, 7 through 13, 15 through 17, and 19 through 22 hereof.

33. By the above described combination, arrangements, and conspiracy, defendants have restrained and are restraining trade and plaintiff's free exercise of playing professional baseball in New York, California, and the several states in which defendants stage baseball games, in violation of the common law.

34. Unless equitable relief is granted, these violations will continue and will succeed in causing irreparable in-

jury to plaintiff and the public. Plaintiff has no adequate and complete remedy at law.

35. Plaintiff repeats and realleges paragraph 24 hereof.

FOURTH CAUSE OF ACTION AGAINST DEFENDANTS ATLANTA BRAVES, INC., THE CINCINNATI REDS, INC., LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB LTD., METROPOLITAN BASEBALL CLUB, INC., PITTSBURGH ATHLETIC CO., INC., BALTIMORE BASEBALL CLUB, INC., CLEVELAND INDIANS, INC., NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., MINNESOTA TWINS, INC., PACIFIC NORTHWEST SPORTS, INC., ST. LOUIS NATIONAL BASEBALL CLUB, INC.

36. This claim arises under the Thirteenth Amendment to the United States Constitution, 18 U.S.C. § 1581, 42 U.S.C. § 1994, and 29 U.S.C. §§ 102 and 103. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331 and 1343.

37. The amount in controversy exceeds $10,000, exclusive of interest and costs.

38. Plaintiff repeats and realleges paragraphs 2, 7 through 13, 15 through 17, and 19 through 22 hereof.

39. The reserve system is a practice constituting, and resulting in, peonage and involuntary servitude in violation of 42 U.S.C. § 1994, 18 U.S.C. § 1581, and the Thirteenth Amendment to the United States Constitution. The reserve system also deprives ballplayers freedom of labor in violation of 29 U.S.C. §§ 102 and 103.

40. Defendants are now engaged in a conspiracy to force plaintiff to play solely for one professional baseball club to the exclusion of all other professional baseball clubs, and therefore to subject plaintiff to peonage and involuntary servitude in violation of 42 U.S.C. § 1994, 18 U.S.C. § 1581, and the Thirteenth Amendment to the United States Constitution, and to deprive plaintiff of his freedom of labor in violation of 29 U.S.C. §§ 102 and 103.

Docket Entries

Date	*Proceedings*
June 10-70	Trial continued 6-5, 8, 9, 10. Trial concluded dated 6-10-70. Decision Reserved. Cooper, J.
June 19-70	Filed Transcript of record of proceedings, dated 3-31-70.
June 19-70	Filed Transcript of record of proceedings, dated 5-1-70.
June 19-70	Filed Transcript of record of proceedings, dated 5-21-70.
June 19-70	Filed Transcript of record of proceedings, dated 5-22-70.
June 19-70	Filed Transcript of record of proceedings, dated 5-25-70.
June 19-70	Filed Transcript of record of proceedings, dated 5-26-70.
June 19-70	Filed Transcript of record of proceedings, dated 5-27-70.
June 19-70	Filed Transcript of record of proceedings, dated 5-28 70.
June 19-70	Filed Transcript of record of proceedings, dated 6-1-70.
June 19-70	Filed Transcript of record of proceedings, dated 6-2-70.
June 19-70	Filed Transcript of record of proceedings, dated 6-3-70.
June 19-70	Filed Transcript of record of proceedings, dated 6-4-70.
June 19-70	Filed Transcript of record of proceedings, dated 6-5-70.
June 19-70	Filed Transcript of record of proceedings, dated 6-8-70.

Docket Entries

Date	*Proceedings*
June 19-70	Filed Transcript of record of proceedings, dated 6-9-70.
June 19-70	Filed Transcript of record of proceedings, dated 6-10-70.
Aug. 12-70	Filed Plaintiff's Post-Trial Reply Brief.
Aug. 12-70	Filed Plaintiff's Post-Trial Brief.
Aug. 12-70	Filed Post-Trial Memorandum of deft. Bowie K. Kuhn.
Aug. 12-70	Filed Defendants' Reply to Plaintiffs' Post-Trial Brief.
Aug. 12-70	Filed Post-Trial Memorandum of all defendants other than Bowie K. Kuhn.
Aug. 12-70	Filed Opinion #37016. The Clerk is directed to enter judgment in favor of defendants and against plaintiff on each cause of action herein. So ordered. The foregoing opinion constitutes this Court's finding of fact and conclusions of law pur. to Rule 52(a) FRCP. So ordered. Cooper, J. (mailed notice).
Aug. 13-70	Filed Judgment. Ordered that defts. have judgment against pltf. Curtis C. Flood dismissing the complaint. Clerk. (mailed notice).
Aug. 24-70	Filed pltff. Notice of Appeal. (mailed copies)
Nov. 13-70	Filed Transcript of record of proceedings, dated 3-24-70.
Nov. 13-70	Filed Transcript of record of proceedings, dated 2-3-70.

A True Copy

JOHN LIVINGSTON, *Clerk*

By I. WEINBERG
Deputy Clerk

41. Unless equitable relief is granted, these violations will continue and will succeed in causing irreparable injury to plaintiff and the public.

42. Plaintiff has no complete or adequate remedy at law.

FIFTH CAUSE OF ACTION, AGAINST DEFENDANTS ST. LOUIS NATIONAL BASEBALL CLUB, INC., AND NEW YORK YANKEES, INC.

43. This claim arises under the Sherman Anti-Trust Act and the Clayton Anti-Trust Act. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1337.

44. Plaintiff repeats and realleges paragraphs 2 and 4 through 22 hereof.

45. As part of its business of staging baseball games, defendant St. Louis National Baseball Club, Inc. derives substantial revenues from concession sales in its baseball stadium. On information and belief, a substantial portion of such revenues from concession sales are derived from the sale of beer.

46. Through a subsidiary, affiliate, or parent corporation, defendant St. Louis National Baseball Club, Inc. is also engaged in the production, distribution, and sale of beer. On information and belief, by means of various contracts, agreements, and combinations, defendant St. Louis National Baseball Club, Inc. has limited the sale of beer in the stadium concession sales to the beer produced by the affiliated company, and has excluded all other beer companies from selling or attempting to sell beer through concession sales in the stadium, in violation of §§ 1 and 2 of the Sherman Anti-Trust Act and § 3 of the Clayton Anti-Trust Act (15 U.S.C. §§ 1, 2, and 14).

47. On information and belief, the effect of this violation has been, and will continue to be, to increase the revenues of the beer company and diminish the revenues of defend-

ant St. Louis National Baseball Club, Inc. available for player salaries, including that of plaintiff.

48. Defendant New York Yankees, Inc. are owned by the Columbia Broadcasting System, one of the three national radio and television networks which might bid on the right to broadcast professional baseball games. On information and belief, as a result of its ownership of the New York Yankees, Inc., the Columbia Broadcasting System has refrained from bidding on such broadcast rights with consequent injury to competition, in violation of §§ 1 and 2 of the Sherman Anti-Trust Act and § 7 of the Clayton Anti-Trust Act (15 U.S.C. §§ 1, 2, and 18).

49. The consequence of this violation has been, and continues to be, to reduce the revenues of Organized Baseball from the sale of broadcast rights, in which revenues players such as plaintiff would share.

50. Unless equitable relief is granted these violations by defendants St. Louis National Baseball Club, Inc. and New York Yankees, Inc. will continue and will succeed in causing irreparable injury to plaintiff and the public.

51. Plaintiff has no adequate or complete remedy at law.

WHEREFORE, plaintiff demands judgment against defendants as follows:

1. With respect to the first cause of action, against all defendants: (a) declaring Organized Baseball, the reserve system, and defendants' conspiracy against plaintiff to be unlawful under the Sherman Anti-Trust Act; and (b) preliminarily and permanently enjoining defendants from enforcing the reserve system against plaintiff and from conspiring not to allow any baseball club other than the Philadelphia Phillies to negotiate with plaintiff; and (c) for treble plaintiff's damages of $25,000, together with the costs of this action and reasonable attorneys' fees; or, in the alternative, if equitable relief is denied, (d) for treble plain-

tiff's damages of $1,000,000, together with the costs of this action and reasonable attorneys' fees;

2. With respect to the second and third causes of action, against the defendants named therein: (a) declaring the reserve system and defendants' conspiracy against plaintiff to be unlawful under § 340 of the General Business Law of New York, under §§ 16720 and 16726 of the California Business and Professional Code, under § 2855 of the California Labor Code, under other statutes of the several states, and under common law; and (b) preliminarily and permanently enjoining defendants from enforcing the reserve system against plaintiff and from conspiring not to allow defendants to negotiate with plaintiff; and (c) for plaintiff's damages of $25,000, together with the costs of this action and reasonable attorneys' fees; or, in the alternative, if equitable relief is denied, (d) for plaintiff's damages of $1,000,000, together with the costs of this action and reasonable attorneys' fees;

3. With respect to the fourth cause of action, against the defendants named therein: (a) declaring the reserve system and defendants' conspiracy against plaintiff to be unlawful under the Thirteenth Amendment to the United States Constitution, under 42 U.S.C. § 1994 and 18 U.S.C. § 1581, under 29 U.S.C. §§ 102 and 103; and (b) preliminarily and permanently enjoining defendants from enforcing the reserve system upon plaintiff and from conspiring to force plaintiff to play for the Philadelphia Phillies and no other ball club;

4. With respect to the fifth cause of action, against defendants St. Louis National Baseball Club, Inc. and New York Yankees, Inc.: (a) declaring the practices of defendants described therein to be unlawful under the Sherman Anti-Trust Act and the Clayton Anti-Trust Act; and (b) enjoining defendants from continued violations of those Acts; and

5. Such other relief as may to the Court seem just.

Dated: New York, New York
January 16, 1970

ARTHUR J. GOLDBERG,
A member of the firm of
Paul, Weiss, Goldberg, Rifkind,
Wharton & Garrison
345 Park Avenue
New York, New York 10022

ALLAN H. ZERMAN
225 S. Meremec Avenue
Clayton, Missouri 63105

Attorneys for Plaintiff
Curtis C. Flood

(EXHIBIT A)

UNIFORM PLAYER'S CONTRACT

NATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS

PARTIES

Between ST. LOUIS NATIONAL BASEBALL CLUB, INC. herein called the Club, and CURTIS CHARLES FLOOD of 4466 West Pine, St. Louis, Missouri, herein called the Player.

RECITAL

The Club is a member of the National League of Professional Baseball Clubs, a voluntary association of twelve member Clubs which has subscribed to the Major League Rules with the American League of Professional Baseball Clubs and its constituent Clubs and to the Professional Baseball Rules with that League and the National Association of Baseball Leagues. The purpose of those rules is to insure the public wholesome and high-class professional baseball by defining the relations between Club and Player, between Club and Club, between League and League, and by vesting in a designated Commissioner broad powers of control and discipline, and of decision in case of disputes.

AGREEMENT

In consideration of the facts above recited and of the promises of each to the other, the parties agree as follows:

EMPLOYMENT

1. The Club hereby employs the Player to render, and the Player agrees to render, skilled services as a baseball player during the year 1969 including the Club's training season, the Club's exhibition games, the Club's playing season, and the World Series (or any other official series in which the Club may participate and in any receipts of which the player may be entitled to share).

PAYMENT

2. For performance of the Player's services and promises hereunder the Club will pay the Player the sum of $90,000, in semi-monthly installments after the commencement of the playing season covered by this contract. Payment shall be made on the day the amount becomes due, regardless of whether the Club is "home" or "abroad".

If a monthly rate of payment is stipulated above, it shall begin with the commencement of the Club's playing season (or such subsequent date as the Player's services may commence) and end with the termination of the Club's scheduled playing season and shall be payable in semi-monthly installments as above provided.

Nothing herein shall interfere with the right of the Club and the Player by special covenant herein to mutually agree upon a method of payment whereby part of the Player's salary for the above year can be deferred to subsequent years.

If the Player is in the service of the Club for part of the playing season only, he shall receive such proportion of the sum above mentioned, as the number of days of his actual employment in the Club's playing season bears to the number of days in said season.

Notwithstanding the rate of payment stipulated above, the minimum rate of payment to the Player for each day of service on a Major League Club shall be at the rate of $10,000 per year; except, if a Player physically joins a Major League Club on or after September 1, he shall be paid during September at the rate of $8,500 per year for each day of service until he has accumulated a total of 60 days of Major League service, after which he shall be paid at the rate of $10,000 per year for each day of service with such Major League Club.

Payment to the Player at the rate stipulated above shall be continued throughout any period in which a Player is required to attend a regularly scheduled military encampment of the Reserve of the Armed Forces or of the National Guard during the Club's playing season.

LOYALTY

3. (a) The Player agrees to perform his services hereunder diligently and faithfully, to keep himself in first-class physical condition and to obey the Club's training rules, and pledges himself to the American public and to the Club to conform to high standards of personal conduct, fair play and good sportsmanship.

BASEBALL PROMOTION

(b) In addition to his services in connection with the actual playing of baseball, the Player agrees to cooperate with the Club and participate in any and all promotional activities of the Club and its League, which, in the opinion of the Club, will promote the welfare of the Club or professional baseball, and to observe and comply with all requirements of the Club respecting conduct and service of its team and its players, at all times whether on or off the field.

PICTURES AND PUBLIC APPEARANCES

(c) The Player agrees that his picture may be taken for still photographs, motion pictures or television at such

times as the Club may designate and agrees that all rights in such pictures shall belong to the Club and may be used by the Club for publicity purposes in any manner it desires. The Player further agrees that during the playing season he will not make public appearances, participate in radio or television programs or permit his picture to be taken or write or sponsor newspaper or magazine articles or sponsor commercial products without the written consent of the Club, which shall not be withheld except in the reasonable interests of the Club or professional baseball.

PLAYER REPRESENTATIONS

ABILITY

4. (a) The Player represents and agrees that he has exceptional and unique skill and ability as a baseball player; that his services to be rendered hereunder are of a special, unusual and extraordinary character which gives them peculiar value which cannot be reasonably or adequately compensated for in damages at law, and that the Player's breach of this contract will cause the Club great and irreparable injury and damage. The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract.

CONDITION

(b) The Player represents that he has no physical or mental defects known to him, which would prevent or impair performance of his services.

INTEREST IN CLUB

(c) The Player represents that he does not, directly or indirectly, own stock or have any financial interest in the ownership of earnings of any Major League Club, except

as hereinafter expressly set forth, and covenants that he will not hereafter, while connected with any Major League Club, acquire or hold any such stock or interest except in accordance with Major League Rule 20(e).

SERVICE

5. (a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games under the conditions prescribed in the Major League Rules. Major League Rule 18(b) is set forth on page 4 hereof.

OTHER SPORTS

(b) The Player and the Club recognize and agree that the Player's participation in other sports may impair or destroy his ability and skill as a baseball player. Accordingly the Player agrees that he will not engage in professional boxing or wrestling; and that, except with the written consent of the Club, he will not engage in any game or exhibition of football, basketball, hockey or other athletic sport.

ASSIGNMENT

6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules.

NO SALARY REDUCTION

(b) The amount stated in paragraph 2 hereof which is payable to the Player for the period stated in paragraph 1 hereof shall not be diminished by any such assignment, except for failure to report as provided in the next subparagraph (c).

REPORTING

(c) The Player shall report to assignee Club promptly (as provided in the Regulations) upon receipt of written

notice from the Club of the assignment of this contract. If the Player fails so to report, he shall not be entitled to any payment for the period from the date he receives written notice of assignment until he reports to the assignee Club.

OBLIGATIONS OF ASSIGNOR AND ASSIGNEE CLUBS

(d) Upon and after such assignment, all rights and obligations of the assignor Club hereunder shall become the rights and obligations of the assignee Club; provided, however, that

(1) The assignee Club shall be liable to the Player for payments accruing only from the date of assignment and shall not be liable (but the assignor Club shall remain liable) for payments accrued prior to that date.

(2) If at any time the assignee is a Major League Club, it shall be liable to pay the Player at the full rate stipulated in paragraph 2 hereof for the remainder of the period stated in paragraph 1 hereof and all prior assignors and assignees shall be relieved of liability for any payment for such period.

(3) Unless the assignor and assignee Clubs agree otherwise, if the assignee Club is a National Association Club, the assignee Club shall be liable only to pay the Player at the rate usually paid by said assignee Club to other players of similar skill and ability in its classification and the assignor Club shall be liable to pay the difference for the remainder of the period stated in paragraph 1 hereof between an amount computed at the rate stipulated in paragraph 2 hereof and the amount so payable by the assignee Club.

MOVING EXPENSE

(e) If this contract is assigned by a Major League Club to another Major League Club during the playing sea-

son, the assignor Club shall pay the Player, for all moving and other expenses resulting from such assignment, the sum of $300 if the contract is assigned between Clubs in the same zone; the sum of $600 if the contract is assigned between a Club in the Eastern Zone and a Club in the Central Zone; the sum of $900 if the contract is assigned between a Club in the Central Zone and a Club in the Western Zone; and the sum of $1,200 if the contract is assigned between a Club in the Eastern Zone and a Club in the Western Zone. The Eastern Zone shall include the Philadelphia, New York and Pittsburgh Clubs in the National League and the Baltimore, Boston, New York and Washington Clubs in the American League; the Central Zone shall include the Chicago, Cincinnati, Atlanta, St. Louis and Houston Clubs in the National League and the Chicago, Cleveland, Detroit and Minnesota Clubs in the American League; the Western Zone shall include the Los Angeles and San Francisco Clubs in the National League and the California and Oakland Clubs in the American League.

If, during the Major League playing season, a Player is required to report to a Major League Club from a National Association Club, or to a National Association Club from a Major League Club, such Major League Club shall pay the reasonable and actual moving expenses of the Player and his immediate family resulting therefrom and shall reimburse the Player for up to one month's rental payments for living quarters in the city from which the Player is transferred for which he is legally obligated after the date of the transfer and for which he is not otherwise reimbursed; except the foregoing shall not apply if the Player is required to report on or after September 1.

"CLUB"

(f) All references in other paragraphs of this contract to "the Club" shall be deemed to mean and include any assignee of this contract.

TERMINATION BY PLAYER

7. (a) The Player may terminate this contract, upon written notice to the Club, if the Club shall default in the payments to the Player provided for in paragraph 2 hereof or shall fail to perform any other obligation agreed to be performed by the Club hereunder and if the Club shall fail to remedy such default within ten (10) days after the receipt by the Club of written notice of such default. The Player may also terminate this contract as provided in subparagraph (f) (4) of this paragraph 7.

BY CLUB

(b) The Club may terminate this contract upon written notice to the Player (but only after requesting and obtaining waivers of this contract from all other Major League Clubs) if the Player shall at any time:

(1) fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club's training rules; or

(2) fail, in the opinion of the Club's management, to exhibit sufficient skill or competitive ability to qualify or continue as a member of the Club's team; or

(3) fail, refuse or neglect to render his services hereunder or in any other manner materially breach this contract.

(c) If this contract is terminated by the Club by reason of the Player's failure to render his services hereunder due to disability resulting directly from injury sustained in the course and within the scope of his employment hereunder and written notice of such injury is given by the Player as provided in the Regulations on page 4 hereof, the Player shall be entitled to receive his full salary for the season in which the injury was sustained, less all

workmen's compensation payment paid or payable by reason of said injury.

(d) If this contract is terminated by the Club during the training season, payment by the Club of the Player's board, lodging, and expense allowance during the training season to the date of termination and of the reasonable traveling expenses of the Player, including first-class jet air fare and meals en route to his home city, and the expert training and coaching provided by the Club to the Player during the training season shall be full payment to the Player.

(e) If this contract is terminated by the Club during the playing season, then, except in the case provided for in sub-paragraph (c) of this paragraph 7, the Player shall be entitled to receive as full payment hereunder such portion of the amount stipulated in paragraph 2 hereof as the number of days of his actual employment in the Club's playing season bears to the total number of days in said season, provided, however, that if this contract is terminated under sub-paragraph (b) (2) of this paragraph 7 for failure to exhibit sufficient skill or competitive ability, the Player shall be entitled to an additional amount equal to thirty (30) days payment at the rate stipulated in paragraph 2 hereof and the reasonable traveling expenses of the Player including first-class jet air fare and meals en route to his home city.

PROCEDURE

(f) If the Club proposes to terminate this contract in accordance with sub-paragraph (b) of this paragraph 7, the procedure shall be as follows:

(1) The Club shall request waivers from all other Major League Clubs. Such waiver request must state that it is for the purpose of terminating this contract and it may not be withdrawn.

(2) Upon receipt of the waiver request, any other Major League Club may claim assignment of this contract at a waiver price of $1.00, the priority of claims to be determined in accordance with the Major League Rules.

(3) If this contract is so claimed, the Club shall, promptly and before any assignment, notify the Player that it had requested waivers for the purpose of terminating this contract and that the contract had been claimed.

(4) Within 5 days after receipt of notice of such claim, the Player shall be entitled, by written notice to the Club to terminate this contract on the date of his notice of termination. If the Player fails so to notify the Club, this contract shall be assigned to the claiming Club.

(5) If the contract is not claimed, the Club shall promptly deliver written notice of termination to the Player at the expiration of the waiver period.

(g) Upon any termination of this contract by the Player, all obligations of both parties hereunder shall cease on the date of termination, except the obligation of the Club to pay the Player's compensation to said date.

REGULATIONS

8. The Player accepts as part of this contract the Regulations printed on the fourth page hereof.

RULES

9. (a) The Club and the Player agree to accept, abide by and comply with all provisions of the Major League Agreement, the Major League Rules, the Rules or Regulations of the League of which the Club is a member, and the Professional Baseball Rules, in effect on the date of this Uniform

Player's Contract, which are not inconsistent with the provisions of this contract or the provisions of any agreement between the Major League Clubs and the Major League Baseball Players Association, provided that the Club, together with the other Clubs of the American and National Leagues and the National Association, reserves the right to modify, supplement or repeal any provision of said Agreement, Rules and/or Regulations in a manner not inconsistent with this contract or the provisions of any then existing agreement between the Major League Clubs and the Major League Baseball Players Association. A copy of the Major League Agreement, the Major League Rules, the Rules or Regulations of the League of which the Club is a member, and the Professional Baseball Rules, as in effect on the date of this Contract has been delivered to the Player prior to execution of this Contract.

DISPUTES

(b) All disputes between the Player and the Club which are covered by the Grievance Procedure as set forth in the Agreement between the twenty Clubs and the Major League baseball players, as represesnted by the Major League Baseball Players Association, dated February 19, 1968, shall be resolved in accordance with such Grievance Procedure, which is incorporated herein by reference.

PUBLICATION

(c) The Club, the League President and the Commissioner, or any of them, may make public the findings, decision and record of any inquiry, investigation or hearing held or conducted, including in such record all evidence or information, given, received or obtained in connection therewith.

RENEWAL

10. (a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following

the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.

(b) The Club's right to renew this contract, as provided in sub-paragraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof.

11. This contract is subject to federal or state legislation, regulations, executive or other official orders or other governmental action, now or hereafter in effect respecting military, naval, air or other governmental service, which may directly or indirectly affect the Player, Club or the League and subject also to the right of the Commissioner to suspend the operation of this contract during any national emergency.

COMMISSIONER

12. The term "Commissioner" wherever used in this contract shall be deemed to mean the Commissioner designated under the Major League Agreement, or in the case of a vacancy in the office of Commissioner, the Executive Council or such other body or person or persons as shall be designated in the Major League Agreement to exercise the powers and duties of the Commissioner during such vacancy.

SUPPLEMENTAL AGREEMENTS

The Club and the Player covenant that this contract fully sets forth all understandings and agreements between them, and agree that no other understandings or agreements, whether heretofore or hereafter made, shall be valid, recognizable, or of any effect whatsoever, unless expressly set forth in a new or supplemental contract executed by the Player and the Club (acting by its president, or such other officer as shall have been thereunto duly authorized by the president or Board of Directors, as evidenced by a certificate filed of record with the League President and Commissioner) and complying with the Major League Rules and the Professional Baseball Rules.

SPECIAL COVENANTS.

APPROVAL

This contract or any supplement hereto shall not be valid or effective unless and until approved by the League President.

Signed in duplicate this 3rd day of March, A.D. 1969

CURTIS C. FLOOD
(Player)
4466 West Pine
St. Louis, Missouri
(Home address of Player)
Social Security No. 556-48-5405
Approved , 196

WARREN GILES

President, National League of Professional Baseball Clubs
ST. LOUIS NATIONAL BASEBALL CLUB, INC.

By VAUGHAN P. DEVINE
(Authorized Signature)
Gen. Mgr.

REGULATIONS [appended to contract]

1. The Club's playing season for each year covered by this contract and all renewals hereof shall be as fixed by the National League of Professional Baseball Clubs, or if this contract shall be assigned to a Club in another League, then by the League of which such assignee is a member.

2. The Player, when requested by the Club, must submit to a complete physical examination at the expense of the Club, and if necessary to treatment by a regular physician or dentist in good standing. Upon refusal of the Player to submit to a complete medical or dental examination the Club may consider such refusal a violation of this regulation and may take such action as it deems advisable under Regulation 5 of this contract. Disability directly resulting from injury sustained in the course and within the scope of his employment under this contract shall not impair the right of the Player to receive his full salary for the period of such disability or for the season in which the injury was sustained (whichever period is shorter), together with the reasonable medical and hospital expenses incurred by reason of the injury and during the term of this contract, less all workmen's compensation payments paid or payable by reason of said injury; but only upon the express prerequisite conditions that (a) written notice of such injury, including the time, place, cause and nature of the injury, is served upon and received by the Club within twenty days of sustaining of said injury and (b) the Club shall have the right to designate the doctors and hospitals furnishing such medical and hospital services. Any other disability may be ground for suspending or terminating this contract at the discretion of the Club.

3. The Club will furnish the Player with two complete uniforms, exclusive of shoes, which uniforms will be surrendered by the Player to the Club at the end of the season or upon termination of this contract.

4. The Club will pay all proper and necessary traveling expenses of the Player while "abroad", or traveling with the Club in other cities, including board, and first-class air and hotel accommodations, if practicable.

During the championship season, the allowance for meals and tips shall be $15 per day for each date a Club is on the road and for each traveling day. No deductions will be made for meals served on an airplane. If, when a Club departs from the home city, departure is scheduled prior to 12:00 Noon, the Player will receive $15 for that date; if departure is after 12:00 Noon, the Player will receive $7.50 for that date. Returning to the home city, if arrival is later than 6:00 p.m. the Player will receive $15; if arrival is prior to 6:00 p.m., the Player will receive $7.50. The Club may require the Player to sign checks for meals at a hotel in lieu of the cash meal allowance.

During the training season, the Player will receive an allowance of $40 per week, payable in advance, to cover training camp expenses. If the Player has his family in camp and is granted consent to live away from the Club's headquarters, he shall receive a meal money allowance of $12 per day, without deduction for lunch or sandwiches served at the ball park; and a room allowance equal to what the Club actually saves on hotel expenses by reason of the Player not staying at the Club hotel. Where the Club owns its own facilities (such as Los Angeles or Houston) where there is no saving, the Club will allow $2 per day per room, in addition to the $12 allowance for meals.

The Club will also pay the first-class jet air fare of the Player to his home at the end of the season, provided, however, that if the Club finishes its season "abroad" and appropriate transportation is not provided back to the Club's home city, the Player shall be paid an amount equal to the first-class jet air fare back to the Club's home city plus the first-class jet air fare from the Club's home city to the

Player's home, provided the Player elects to return home via the Club's home city.

5. For violation by the Player of any regulation or other provision of this contract, the Club may impose a reasonable fine and deduct the amount thereof from the Player's salary or may suspend the Player without salary for a period not exceeding thirty days, or both. Written notice of the fine or suspension or both and the reason therefore shall in every case be given to the Player.

6. In order to enable the Player to fit himself for his duties under this contract, the Club may require the Player to report for practice at such places as the Club may designate and to participate in such exhibition contests as may be arranged by the Club, for a period beginning not earlier than March 1, without any other compensation than that herein elsewhere provided. The Club will pay the necessary traveling expenses, including the first-class jet air fare and meals en route of the Player from his home city to the training place of the Club, whether he be ordered to go there directly or by way of the home city of the Club. In the event of the failure of the Player to report for practice or to participate in the exhibition games, as required and provided for, he shall be required to get into playing condition to the satisfaction of the Club's team manager, and at the Player's own expense, before his salary shall commence.

7. In case of assignment of this contract the Player shall report promptly to the assignee club within 72 hours from the date he receives written notice from the Club of such assignment, if the Player is then not more than 1600 miles by most direct available railroad route from the assignee Club, plus an additional 24 hours for each additional 800 miles.

Post-Season Exhibition Games. Major League Rule 18(b) provides:

Exhibition Games. (b) No player shall participate in any exhibition game played during the period between the close

of the Major League championship season and the following training season; except that a Player, with the written consent of the Commissioner, may participate in exhibition games which are played within thirty days after the close of the Major League championship season and which are approved by the Commissioner. Player conduct, on and off the field, in connection with such post-season exhibition games shall be subject to the discipline of the Commissioner. The Commissioner shall not approve more than three Players of any one Club on the same team. No Player shall participate in any exhibition game with or against any team which, during the current season or within one year, has had any ineligible player or which is or has been during the current season or within one year, managed and controlled by an ineligible player under an assumed name or who otherwise has violated, or attempted to violate, any exhibition game contract; or with or against any team which, during said season or within one year, has played against teams containing such ineligible players, or so managed or controlled. Any player violating this rule shall be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500), except that in no event shall such fine be less than the consideration received by such player for participating in such game.

Revised 10/1/68

[EXHIBIT B]

NOTICE TO PLAYER No. 614

NOTICE TO PLAYER OF RELEASE OR TRANSFER

NATIONAL LEAGUE

October 8, 1969

To Mr. CURTIS CHARLES FLOOD

You are hereby notified as follows:

1. *That you are unconditionally released.*

2. *That your contract has been assigned to the* Philadelphia *Club of* National *League.*

(a) Without right of recall.

(b) With right of recall.

(Cross out parts not applicable. In case of optional agreement, specify all conditions affecting player.)

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.....

ST. LOUIS NATIONAL BASEBALL CLUB, INC.
Corporate Name of Club.

VAUGHAN P. DEVINE
President.

Copy must be delivered to player: also forwarded to President of League of which Club is a member, and to the Commissioner.

[EXHIBIT C]

October 8, 1969

Mr. CURTIS C. FLOOD
4466 West Pine
St. Louis, Missouri 63108

Dear CURT:

Enclosed herewith is Player Report Notice #614 covering the OUTRIGHT assignment of your contract to the Philadelphia Club of the National League, October 8, 1969.

Best of luck.

Sincerely yours,

/s/ BING DEVINE
General Manager

BD:maq
enc.

[EXHIBIT D]

CURT FLOOD & ASSOC., INC.
CURT FLOOD STUDIOS

8007 Clayton Road
St. Louis, Missouri 63117
PArkview 5-3550

December 24, 1969

Mr. BOWIE K. KUHN
Commissioner of Baseball
680 Fifth Avenue
New York, New York 10019

Dear Mr. KUHN:

After twelve years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several States.

It is my desire to play baseball in 1970, and I am capable of playing. I have received a contract offer from the Philadelphia Club, but I believe I have the right to consider offers from other clubs before making any decisions. I, therefore, request that you make known to all the Major League Clubs my feelings in this matter, and advise them of my availability for the 1970 season.

Sincerely yours,

/s/ CURT FLOOD
Curt Flood

CF/j
CC—Mr. Marvin J. Miller
—Mr. John Quinn

[EXHIBIT E]

BASEBALL

OFFICE OF THE COMMISSIONER
680 FIFTH AVENUE
NEW YORK, N. Y. 10019

BOWIE K. KUHN
COMMISSIONER

Telephone 212-205-0200

December 30, 1969

Dear CURT:

This will acknowledge your letter of December 24, 1969, which I found on returning to my office yesterday.

I certainly agree with you that you, as a human being, are not a piece of property to be bought and sold. That is fundamental in our society and I think obvious. However, I cannot see its applicability to the situation at hand.

You have entered into a current playing contract with the St. Louis club which has the same assignment provision as those in your annual Major League contracts since 1956. Your present contract has been assigned in accordance with its provisions by the St. Louis club to the Philadelphia club. The provisions of the playing contract have been negotiated over the years between the clubs and the players, most recently when the present Basic Agreement was negotiated two years ago between the clubs and the Players Association.

If you have any specific objection to the propriety of the assignment, I would appreciate your specifying the objection. Under the circumstances, and pending any further information from you, I do not see what action I can take and cannot comply with the request contained in the second paragraph of your letter.

I am pleased to see your statement that you desire to play baseball in 1970. I take it this puts to rest any thought,

as reported earlier in the press, that you were considering retirement.

Sincerely yours,

/s/ Bowie K. Kuhn

BKK/ms
Mr. Curt Flood
Curt Flood & Assoc., Inc.
8007 Clayton Road
St. Louis, Missouri 63117

cc: Mr. Marvin J. Miller
cc: Mr. Vaughan P. (Bing) Devine
cc: Mr. John J. Quinn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action
70 Civ. 202

– against –

Bowie K. Kuhn, *et al., Defendants*

Answer

The defendant Bowie K. Kuhn, by his attorneys, Donovan Leisure, Newton & Irvine, and Arnold & Porter, answers the Complaint as follows:

First Defense

The defendant says as follows with respect to the paragraphs of the Complaint:

1. Defendant admits that the action purports to arise under the Sherman Act and the Clayton Act as alleged in paragraph 1 and that the plaintiff seeks to invoke the

jurisdiction of this Court under Section 1337 of the Judicial Code, but denies that the action is well founded thereunder or that the Court has jurisdiction thereunder.

2. The allegations of paragraph 2 are admitted.

3. The allegations of the first sentence of paragraph 3 are denied. The allegations of the second, third, fourth and fifth sentences of paragraph 3 are admitted. The allegations of the sixth sentence of paragraph 3 are denied, except that defendant Kuhn admits the defendant clubs are engaged in the business of exhibiting baseball games.

4. With respect to the allegations of paragraph 4, defendant admits that under present concepts of interstate commerce defendants are engaged therein, but says that their activities are not subject to the antitrust laws. The other allegations of paragraph 4 are denied.

5. Defendant admits the allegations of the first sentence of subparagraphs (a) through (d) of paragraph 5, and, on information and belief, the second sentence of subparagraph (d) thereof. Defendant is without information sufficient to form a belief as to the truth of the remaining allegations of paragraph 5.

6. Subject to the response made to paragraph 4, defendant denies all the allegations of paragraph 6, except that he admits that receipts from the box office and radio and television have increased since 1950.

7. As to the allegations of paragraph 7, defendant admits that there are approximately 125 minor league clubs, that the defendants, together with these clubs, are sometimes referred to as "Organized Baseball," and that there are various agreements among defendants and between defendants and the minor league clubs and leagues. The remaining allegations of paragraph 7 are denied.

8. In regard to the allegations of paragraph 8, defendant admits that he is Commissioner of Baseball. All other

allegations of paragraph 8 are denied, and plaintiff is referred to the present Major League Agreement and Rules and the Professional Baseball Agreement and Rules for a more complete and accurate description of the powers and duties of the Commissioner.

9. The allegations of paragraph 9 are admitted.

10. The allegations of paragraph 10 are admitted.

11. The allegations of paragraph 11 are denied, except it is admitted that (a) minor league clubs are members of minor leagues which, in turn, are members of the National Association of Professional Baseball Leagues; (b) these clubs recognize and submit to the jurisdiction of the Commissioner of Baseball to the extent set forth in the Professional Baseball Agreement; and, (c) each defendant club either owns, is affiliated with or has a working arrangement with one or more minor league clubs.

12. The allegations of paragraph 12 are denied.

13. The allegation that Defendant New York Yankees, Inc. is owned by the Columbia Broadcasting System is admitted. All other allegations of paragraph 13 are denied.

14. The allegations of paragraph 14 are denied.

15. The allegations of paragraph 15 are denied.

16. The allegations of paragraph 16 are denied and plaintiff is referred to the uniform contract and the Major League and Professional Baseball Rules for a more accurate description of the reserve system.

17. The allegations of paragraph 17 are denied, and again plaintiff is referred to the Major League and Professional Baseball Rules.

18. The allegations of paragraph 18 are denied.

19. The allegations of paragraph 19 are admitted.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations of paragraph 20.

21. Defendant is without sufficient knowledge to form a belief as to the truth of all allegations in the first sentence of paragraph 21. Defendant admits the allegations in paragraph 21 that plaintiff sent him the letter dated December 24, 1969, which is annexed to plaintiff's Complaint as Exhibit "D", and that defendant sent plaintiff the letter of December 30, 1969, which is annexed to plaintiff's Complaint as Exhibit "E". The remaining allegations of paragraph 21 are denied.

22. The allegations of paragraphs 22 through 24 are denied.

23. As to the allegations in paragraphs 25 through 50 of the plaintiff's Complaint, defendant Bowie K. Kuhn has not been named as a defendant to the causes of action alleged therein, and therefore no response to them is required.

24. The allegations of paragraph 51 are denied.

Second Defense

This Court does not have jurisdiction over the subject matter of this action.

Third Defense

The first cause of action in the Complaint fails to state a claim against this defendant upon which relief can be granted.

Fourth Defense

The Court lacks jurisdiction of the first cause of action because the reserve system, against which the first cause of action is directed, is the subject of collective bargaining under the National Labor Relations Act, as amended, is embodied in the Basic Agreement of January 1, 1968, between the players and the defendants other than Kuhn, and is the subject of continuing collective bargaining between said parties.

Fifth Defense

The laws of the United States, including but not limited to the Norris-LaGuardia and the Clayton Acts, preclude the Court from giving plaintiff the relief he has requested.

Sixth Defense

The National Labor Relations Board has primary jurisdiction over the issues raised by the first cause of action.

Defendant does not, by raising the defenses herein, admit that as to such defenses he has the burden of proof.

Dated: New York, New York
May 4, 1970

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GEORGE S. LEISURE, JR.
JOHN E. TOBIN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 202

CURTIS C. FLOOD, *Plaintiff*,

– against –

BOWIE K. KUHN, Individually and as Commissioner of Baseball, CHARLES S. FEENEY, Individually and as President of the National League of Professional Baseball Clubs, JOSEPH E. CRONIN, Individually and as President of the American League of Professional Baseball Clubs, ATLANTA BRAVES, INC., CHICAGO NATIONAL LEAGUE BALL CLUB, THE CINCINNATI REDS, INC., THE HOUSTON SPORTS ASSOCIATION, LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB LTD., METROPOLITAN BASEBALL CLUB, INC., PHILADELPHIA NATIONAL LEAGUE CLUB, PITTSBURGH ATHLETIC CO., INC., ST. LOUIS NATIONAL BASEBALL CLUB, INC., SAN DIEGO PADRES, SAN FRANCISCO GIANTS' BASEBALL CLUB, BALTIMORE BASEBALL CLUB, INC., BOSTON RED SOX, CLEVELAND INDIANS, INC., DETROIT BASEBALL CLUB, NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., GOLDEN WEST BASEBALL CO., CHICAGO WHITE SOX, KANSAS CITY ROYALS BASEBALL CLUB, MINNESOTA TWINS, INC., OAKLAND ATHLETICS, and PACIFIC NORTHWEST SPORTS, INC.

Defendants.

Answer of Defendants Other Than Bowie K. Kuhn, Commissioner of Baseball

FIRST ALLEGED CAUSE OF ACTION

The answering defendants, CHARLES S. FEENEY, individually and as President of The National League of Professional Baseball Clubs, JOSEPH E. CRONIN, individually and as President of The American League of Professional

Baseball Clubs, ATLANTA BRAVES, INC., CHICAGO NATIONAL LEAGUE BALL CLUB (INC.) sued herein as Chicago National League Ball Club, CINCINNATI REDS, INC., sued herein as The Cincinnati Reds, Inc., HOUSTON SPORTS ASSOCIATION sued herein as The Houston Sports Association, LOS ANGELES DODGERS, INC., MONTREAL BASEBALL PARTNERSHIP REG'D sued herein as Montreal Baseball Club Ltd., METROPOLITAN BASEBALL CLUB, INC., THE PHILADELPHIA NATIONAL LEAGUE CLUB sued herein as Philadelphia National League Club, PITTSBURGH ATHLETIC COMPANY, INC. sued herein as Pittsburgh Athletic Co., Inc., ST. LOUIS NATIONAL BASEBALL CLUB, INC., SAN DIEGO PADRES, NATIONAL EXHIBITION COMPANY sued herein as SAN FRANCISCO GIANTS' BASEBALL CLUB, BALTIMORE BASEBALL CLUB, INC., BOSTON RED SOX, A TRUST sued herein as Boston Red Sox, CLEVELAND INDIANS, INC., JOHN E. FETZER, INC. sued herein as Detroit Baseball Club, NEW YORK YANKEES, INC., THE SENATORS, INC., sued herein as The Washington Senators, Inc., GOLDEN WEST BASEBALL COMPANY sued herein as Golden West Baseball Co., ARTNELL COMPANY, CHICAGO WHITE SOX DIVISION, sued herein as Chicago White Sox, KANSAS CITY ROYALS BASEBALL CORPORATION sued herein as Kansas City Royals Baseball Club, MINNESOTA TWINS, INC., CHARLES O. FINLEY AND COMPANY, INC., OAKLAND ATHLETICS DIVISION, sued herein as Oakland Athletics, and PACIFIC NORTHWEST SPORTS, INC., by their attorneys, WILLKIE FARR & GALLAGHER, for their answer to the first alleged cause of action:

1. Deny the allegations contained in paragraph 1 of the complaint.

2. Admit the allegations contained in paragraph 2 of the complaint.

3. Deny the allegations contained in the first sentence of paragraph 3 of the complaint except that they admit that the defendants are among the major figures and entities comprising major league professional baseball. Admit the allegations contained in the second, third, fourth and fifth

sentences of paragraph 3 of the complaint. Deny the allegations contained in the sixth sentence of paragraph 3 of the complaint, except that they admit that the Major League Clubs are engaged in the business of exhibiting baseball games and activities incidental thereto.

4. Deny the allegations contained in paragraph 4 of the complaint, except that they admit that the defendant Clubs are engaged in interstate commerce.

5. Deny having any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the complaint, except that they admit that the baseball games staged by the club defendants are sometimes broadcast on national radio and television networks and on local radio and television stations; that the staging of baseball games by the club defendants requires travel, communication, movement of equipment and purchases of equipment and supplies in interstate commerce; that the club defendants sometimes sell tickets, employ agents and advertise across state lines and sometimes employ facilities of interstate communications; and that in 1969 the club defendants collectively derived from box office receipts of baseball games sums in excess of $25,000,000.

6. Deny having any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint, except that they deny that the revenue from television exceeds that derived from box office receipts and deny the allegations contained in the last sentence of said paragraph.

7. Deny the allegations contained in paragraph 7 of the complaint, except that they admit that the club defendants, together with more than 125 major league baseball clubs, comprise what is commonly called "Organized Baseball" and that various written agreements have been entered into among the Major League Clubs and Leagues and between them and the minor league clubs and leagues.

8. Deny the allegations contained in paragraph 8 of the complaint, except that they admit that defendant Kuhn, as Commissioner of Baseball, has the powers and duties set forth in the Major League Agreement and Rules and the Professional Baseball Agreement and Rules, copies of which are contained in the Baseball Blue Book annexed hereto as Exhibit A.

9. Admit the allegations contained in paragraph 9 of the complaint.

10. Admit the allegations contained in paragraph 10 of the complaint.

11. Deny the allegations contained in paragraph 11 of the complaint, except that they admit that the minor leagues, composed of minor league clubs, are members of the National Association of Professional Baseball Leagues and that said leagues recognize the office of the Commissioner of Baseball and his jurisdiction to the extent set forth in the Professional Baseball Agreement, a copy of which is contained in Exhibit A hereto, and that each of the club defendants either owns, or is affiliated with, or has working arrangements with certain minor league clubs.

12. Deny the allegations contained in paragraph 12 of the complaint.

13. Deny the allegations contained in paragraph 13 of the complaint, except that they admit that the defendant New York Yankees, Inc., is owned by the Columbia Broadcasting System, Inc.

14. Deny the allegations contained in paragraph 14 of the complaint.

15. Deny the allegations contained in paragraph 15 of the complaint.

16. Deny the allegations contained in paragraph 16 of the complaint, except that they admit that in the Uniform Player's Contract, the Major League Rules, the Profes-

sional Baseball Rules and the Basic Agreement between the defendant Clubs and the Major League Baseball Players Association, certain terms and conditions are provided for the employment and eligibility of players and the reservation and assignment of player contracts and beg leave to refer to the provisions of the Uniform Player's Contract, the Major League Rules, the Professional Baseball Rules and said Basic Agreement for the precise terms thereof.

17. Deny the allegations contained in paragraph 17 of the complaint.

18. Deny the allegations contained in paragraph 18 of the complaint.

19. Admit the allegations contained in paragraph 19 of the complaint.

20. Deny the allegations contained in paragraph 20 of the complaint, except that they admit that the plaintiff was notified of the assignment of his contract by the letter annexed to the complaint as Exhibit C, the card annexed to the complaint as Exhibit B and was otherwise informed of such assignment.

21. Deny having any knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 21 of the complaint, except that they admit that the letters annexed to the complaint as Exhibits D and E were sent and received.

22. Deny the allegations contained in paragraph 22 of the complaint.

23. Deny the allegations contained in paragraph 23 of the complaint.

24. Deny the allegations contained in paragraph 24 of the complaint.

SECOND ALLEGED CAUSE OF ACTION

The defendants named in the second alleged cause of action, by their attorneys, WILLKIE FARR & GALLAGHER, for their answer to the second alleged cause of action:

25. Deny the allegations contained in paragraph 25 of the complaint.

26. Deny having any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 26 of the complaint. Admit that defendant Montreal Baseball Partnership Reg'd sued herein as Montreal Baseball Club, Ltd., is a Canadian partnership. Admit the allegations contained in the third sentence of paragraph 26 of the complaint, except that they deny that the Baltimore Baseball Club, Inc. is a citizen of a state other than Missouri. Deny the allegations contained in the fourth sentence of paragraph 26 of the complaint.

27. In aswer to the allegations contained in paragraph 27 of the complaint, repeat and reallege each and every allegation contained in paragraphs 2, 7 through 13, 15 through 17, and 19 through 22 of this answer, with the same force and effect as if herein again set forth in full.

28. Deny the allegations contained in paragraph 28 of the complaint.

29. Deny the allegations contained in paragraph 29 of the complaint.

30. Deny the allegations contained in paragraph 30 of the complaint.

31. In answer to the allegations contained in paragraph 31 of the complaint, repeat and reallege the denial contained in paragraph 24 of this answer.

THIRD ALLEGED CAUSE OF ACTION

The defendants named in the third alleged cause of action, by their attorneys, WILLKIE FARR & GALLA-

GHER, for their answer to the third alleged cause of action:

32. In answer to the allegations contained in paragraph 32 of the complaint, repeat and reallege each and every allegation contained in paragraphs 25, 26, 2, 7 through 13, 15 through 17, and 19 through 22 of this answer, with the same force and effect as if herein again set forth in full.

33. Deny the allegations contained in paragraph 33 of the complaint.

34. Deny the allegations contained in paragraph 34 of the complaint.

35. In answer to the allegations contained in paragraph 25 of the complaint, repeat and reallege the denial contained in paragraph 24 of this answer.

FOURTH ALLEGED CAUSE OF ACTION

The defendants named in the fourth alleged cause of action, by their attorneys, WILLKIE FARR & GALLAGHER, for their answer to the fourth alleged cause of action:

36. Deny the allegations contained in paragraph 36 of the complaint.

37. Deny the allegations contained in paragraph 37 of the complaint.

38. In answer to the allegations contained in paragraph 38 of the complaint, repeat and reallege each and every allegation contained in paragraph 2, 7 through 13, 15 through 17, and 19 through 22 of this answer, with the same force and effect as if herein again set forth in full.

39. Deny the allegations contained in paragraph 39 of the complaint.

40. Deny the allegations contained in paragraph 40 of the complaint.

41. Deny the allegations contained in paragraph 41 of the complaint.

42. Deny having any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 42 of the complaint.

FIRST AFFIRMATIVE DEFENSE TO THE ALLEGED CAUSES OF ACTION ON BEHALF OF EACH ANSWERING DEFENDANT AGAINST WHOM OR WHICH EACH SUCH CAUSE OF ACTION IS ASSERTED.

43. This Court lacks jurisdiction of the subject matter of all of the causes of action alleged in the complaint and specifically:

(a) As to the First Alleged Cause of Action the activties of the defendants complained of by the plaintiff are exempt from the application of the federal antitrust laws;

(b) As to the Second and Third Alleged Causes of Action, the activities of the defendants complained of by the plaintiff are national and interstate in character and the relief requested by the plaintiff would, if granted, constitute (i) an unreasonable burden upon interstate commerce in violation of the Federal Constitution, (ii) an unlawful regulation of a national activity requiring uniformity of regulation, of baseball, and (iv) interference with federal labor relations policy.

SECOND AFFIRMATIVE DEFENSE TO ALL THE CAUSES OF ACTION ON BEHALF OF EACH ANSWERING DEFENDANT AGAINST WHOM OR WHICH EACH SUCH CAUSE OF ACTION IS ASSERTED.

44. Each such cause of action fails to state a claim against the respective answering defendants upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE TO THE FIRST, SECOND, THIRD AND FOURTH ALLEGED CAUSES OF ACTION ON BEHALF OF EACH ANSWERING DEFENDANT AGAINST WHOM OR WHICH EACH SUCH CAUSE OF ACTION IS ASSERTED.

45. The plaintiff's claims are part of a labor dispute and the primary jurisdiction of the controversy is in the National Labor Relations Board.

FOURTH AFFIRMATIVE DEFENSE TO THE FIRST, SECOND, THIRD AND FOURTH ALLEGED CAUSES OF ACTION ON BEHALF OF EACH ANSWERING DEFENDANT AGAINST WHOM OR WHICH EACH SUCH CAUSE OF ACTION IS ASSERTED.

46. The plaintiff's claims are part of a labor dispute and the Norris-LaGuardia and Clayton Acts preclude this Court from granting an injunction.

FIFTH AFFIRMATIVE DEFENSE TO THE SECOND AND THIRD ALLEGED CAUSES OF ACTION ON BEHALF OF EACH ANSWERING DEFENDANT AGAINST WHOM OR WHICH EACH SUCH CAUSE OF ACTION IS ASSERTED.

47. There is a defect of parties defendant by reason of the failure to join indispensable parties in the second and third causes of action, namely (i) those defendants named as defendants in the first cause of action but not named as defendants in the second and third causes of action, each of whom has a direct interest in the controversy which is of such a nature that a final decree granting the relief prayed for by the plaintiff cannot be made without affecting said interest and injuring their ability to protect such interest; (ii) The Major League Baseball Players Association, an unincorporated association, which has a direct interest in the controversy which is of such a nature that a final decree granting the relief prayed for by plaintiff cannot be made without affecting said interest and affecting their ability to protect such interest. Final disposition of this action in the absence of said parties would leave the

controversy in a condition wholly inconsistent with equity and good conscience.

WHEREFORE, defendants demand judgment dismissing the complaint herein together with the costs and disbursements of this action.

WILLKIE FARR & GALLAGHER

By /s/ MARK F. HUGHES
(A Member of the Firm)
Attorneys for all Defendants
except Bowie K. Kuhn
Office & P.O. Address
1 Chase Manhattan Plaza
New York, New York 10005
422-3100

EXHIBIT A

[Exhibit A is the Baseball Blue Book, is included in the Exhibit Volume as Plaintiff's Exhibit 6, and separate copies are being filed with the Court].

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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70 Civ. 202
OPINION No. 5

CURTIS C. FLOOD, *Plaintiff*,

– against –

BOWIE K. KUHN, Individually and as Commissioner of Baseball, CHARLES S. FEENEY, Individually and as President of the National League of Professional Baseball Clubs, JOSEPH E. CRONIN, Individually and as President of the American League of Professional Baseball Clubs, ATLANTA BRAVES, INC., CHICAGO NATIONAL LEAGUE BALL CLUB, THE CINCINNATI REDS, INC., THE HOUSTON SPORTS ASSOCIATION, LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB LTD., METROPOLITAN BASEBALL CLUB, INC., PHILADELPHIA NATIONAL LEAGUE CLUB, PITTSBURGH ATHLETIC CO., INC., ST. LOUIS NATIONAL BASEBALL CLUB, INC., SAN DIEGO PADRES, SAN FRANCISCO GIANTS' BASEBALL CLUB, BALTIMORE BASEBALL CLUB, INC., BOSTON RED SOX, CLEVELAND INDIANS, INC., DETROIT BASEBALL CLUB, NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., GOLDEN WEST BASEBALL CO., CHICAGO WHITE SOX, KANSAS CITY ROYALS BASEBALL CLUB, MINNESOTA TWINS, INC., OAKLAND ATHLETICS, and PACIFIC NORTHWEST SPORTS, INC.

Defendants.

This is an action brought by plaintiff Curtis C. Flood, a major league professional baseball player, to enjoin[1] the

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[1] Plaintiff also seeks certain treble damages both in addition to injunctive relief and in the alternative if equitable relief is denied.

defendants—several major league baseball clubs, the American and National Leagues of Professional Baseball Clubs, the Commissioner of Baseball, and certain named individuals—from enforcing organized baseball's reserve system against him.[2] Plaintiff now moves for a preliminary injunction enjoining during the pendency of this action each baseball club defendant from refusing to offer employment to him as a baseball player, pursuant to an arrangement among the clubs which constitutes the reserve system, and each individual defendant from taking any action in furtherance of such arrangement.[3]

The application now before us presents a pure question of law. Accordingly, our duty prohibits either the exercise of unrestricted discretionary power or an expression of personal preference. Regardless of our determination of the present application, the merits of the suit itself have yet to be resolved at a full trial.

In October, 1969 the contracts of plaintiff and several other ballplayers for the St. Louis National Baseball Club were assigned to the Philadelphia National League Club in exchange for the contracts of certain players for the Philadelphia Club. Plaintiff objects to this "trade" and refuses to join the Philadelphia Club, claiming as unlawful the reserve system.

Essentially plaintiff's attack is directed against the reserve system which has been in effect for nearly one hun-

[2] A Fifth Cause of Action seeks to enjoin certain other alleged practices of two of the defendant ball clubs which are not relevant to plaintiff's present motion.

[3] Plaintiff has agreed to be confined in this application for a preliminary injunction to the facts that are admitted on both sides and not in controversy. He does not seek an evidentiary hearing to resolve such facts as may be in dispute. Transcript of Argument, February 3, 1970, p. 4.

This opinion constitutes this Court's findings of fact and conclusions of law necessary to our determination in accordance with Rule 52(a), F.R.Civ.P.

dred years and which he charges is unlawful in a number of respects under four separate causes of action. Each seeks a declaration of the illegality of this reserve system and an injunction restraining its operation as to him. First is a federal claim that this constitutes an unreasonable restraint of trade in violation of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2. His second and third are state law claims for violations of the antitrust laws and common law respectively where jurisdiction is based on diversity of citizenship. His fourth cause of action alleges that this system subjects him to a condition of involuntary servitude in violation of the Thirteenth Amendment and certain federal civil rights and labor statutes, 18 U.S.C. §1581, 42 U.S.C. §1994, and 29 U.S.C. §§102 and 103.

The Reserve System

The reserve system (also known as the "reserve clause") is the heart of plaintiff's complaint. No player seeking to play baseball professionally in this country can avoid its strictures since it applies to all clubs in both the major and minor leagues and thus all of organized baseball. The effect of this system is to restrict a player throughout his baseball life to negotiate with only one club at any one time; that club being either the one with which he begins his career or the club to which his contract is assigned.

In general, the reserve system operates by the enforcement of the following baseball rules and contract terms. Rule 3 of the Major League Rules and Professional Baseball Rules[4] agreed to by all professional baseball clubs requires that each club contract with its players only pursuant to the Uniform Players Contract and specifically that "no club shall make a contract . . . containing a non-reserve clause." The Uniform Player's Contract provides in part that if in the year of expiration of the contract a player and a club do not reach agreement on a new con-

[4] Applicable to minor league clubs.

tract by a certain date, the club may unilaterally renew the existing contracts subject to certain salary controls. Such renewal contract would itself contain this renewal clause. The club with which a ballplayer initially signs thus has a right to his services for as long as it wishes to renew his contract, subject only to his right to retire from baseball.

Another section of this same Uniform Contract provides that a player's contract may be assigned, without his approval, to any other major league club in accordance with the baseball rules.

To insure respect for these contract rights once obtained by a club, Rule 4-A of the Major League and Professional Baseball Rules provides that each club may place its players on a reserve list, including any of its players who voluntarily retire or who fail to report to or contract with the club, "and thereafter no player on any list shall be eligible to play for or negotiate with any other club until his contract has been assigned or he has been released."[5] Additionally, Rule 3(g) of the Major League and Professional Baseball Rules binding on all clubs prohibits any "tampering" with the players for any club by any other club.[6]

Introduction

Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and

[5] See also Rule 15 of the Major League and Professional Baseball Rules.

[6] Rule 3(g) provides: "[t]o preserve discipline and competition, and to prevent the enticement of players . . . there shall be no negotiations or dealings respecting employment, either present or prospective, between any player . . . and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List. . . ."

pride and provides a special source of inspiration and competitive team spirit especially for the young.

Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there.

From what the papers before us reflect, we are certain that plaintiff and defendants each believe they have the best interests of the game at heart. In general, defendants contend that the reserve system is essential to prevent a relapse into the instability of those early years of professional baseball when players were free to change teams. Plaintiff, and apparently the Major League Baseball Players Association too, concede the need for some form of reserve on players, but argue that these objectives can be met by a less restrictive system.

The grip may well be far too tight and it may be best to loosen the bonds without permitting the slightest sag to the body of the game. However, courts do not sit as arbitrators. We have no power to devise and enforce alternatives to the present reserve system that may accommodate the interests of both parties.

The sole question before us is whether plaintiff has made the necessary showing to entitle him to a preliminary injunction restraining the operation of the reserve system and making plaintiff a free agent pending a final resolution upon a trial of the substantial issues of fact and law presented by this lawsuit. Under recognized principles, applicable to motions for preliminary injunctive relief, the Court is constrained to deny the motion. This however is the first

inning. We are simply deciding that at this initial stage of the lawsuit, plaintiff is not entitled to the substance of the ultimate relief he seeks.

I.

Standard for Issuance of a Preliminary Injunction

The general purpose of a preliminary injunction is to maintain and preserve the status quo until the case can be ultimately resolved on the merits.[7] It is an extraordinary remedy, to be issued only reluctantly and where the right to the relief is clear.[8] "A clear showing of probable success and possible irreparable injury" is necessary.[9]

Where there is a "lack of adequate showing of irreparable damage" the party seeking a preliminary injunction must convince the court with reasonable certainty that it will ultimately succeed.[10] However, where the "balance of hardships tips decidedly toward the party requesting the temporary relief," the burden of showing probable success lessens to a requirements that he raise "questions going to the merits so serious, substantial and difficult as to make them a fair ground for litigation and thus for more deliberate investigation." [11] The likelihood of success is "merely

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[7] *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199, 204 (2d Cir. 1966).

[8] *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2d Cir. 1969); *601 West 26 Corp. v. Solitron Devices, Inc.*, 291 F.Supp. 882 (S.D.N.Y. 1968); *Blaich v. National Football League*, 212 F.Supp. 319, 320 (S.D.N.Y. 1962).

[9] *Checker Motors Corp.* v. *Chrysler Corp., supra; Societe Comptoir De L'Indus. etc.* v. *Alexander's Dept. Stores Inc.*, 299 F.2d 33, 35 (2d Cir. 1962); *Clairol Inc.* v. *Gillette Co.*, 389 F.2d 264, 265 (2d Cir. 1968).

[10] *H. E. Fletcher Co.* v. *Rock of Ages Corp.*, 326 F.2d 13, 17 (2d Cir. 1963); *Unicon Management Corp.* v. *Koppers Co., supra.*

[11] *Checker Motors Corp.* v. *Chrysler Corp., supra; Unicon Management Corp. v. Koppers Co., supra* at 204–205; *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953).

one strong factor to be weighed along with the comparative injuries of the parties." [12]

With regard to plaintiff's burden on the balance of hardships, the need to show irreparable injury is especially present where "the effect of [a preliminary] injunction is prematurely to give the party seeking it a substantial part of the relief sought in the final judgment." [13]

A. *Status Quo*

The status quo has been frequently defined as the last uncontested status which preceded the pending controversy.[14] A preliminary injunction should serve "to keep the parties while the suit goes on, as far as possible in the respective positions they occupied when the suit began." [15]

The preliminary relief plaintiff seeks is to prohibit defendants from collectively refusing to negotiate with him; in effect, a declaration that he is a "free agent." He has never enjoyed that status in the past and issuance of such a preliminary injunction would grant him the ultimate relief he seeks prior to a determination of the merits and make it difficult to restore the parties to their prior status (plaintiff's contract assigned to Philadelphia should plaintiff fail to sustain his claims. Moreover, we doubt that the abolition of all restraints imposed by the reserve system (including both the right of a club to retain its player and, as a con-

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[12] *Unicon Management Corp.* v. *Koppers Co., supra* at 205.

[13] *Foundry Services* v. *Beneflux Corp.*, 206 F.2d 214, 216 (2d Cir. 1953); *Anderson-Friberg Inc.* v. *Justin R. Clary & Son*, 98 F.Supp. 75, 82 (S.D.N.Y. 1951); *Hambros Bank Ltd.* v. *Meserole*, 287 F.Supp. 69, 71 (S.D.N.Y. 1968).

[14] See *Warner Bros. Pictures* v. *Gittone*, 110 F.2d 292, 293 (3rd Cir. 1940). Cf. *Unicon Management Corp.* v. *Koppers Co., supra* at 204.

[15] *Hamilton Watch Co.* v. *Benrus Watch Co., supra* at 742.

sequence, the right to trade players) could be limited to plaintiff alone should other similarly situated ballplayers seek a similar injunction.

Enjoining defendants from refusing to negotiate with plaintiff "[m]ost assuredly . . . would not be preserving any semblance of the situation as it existed just prior to the commencement of the present litigation."[16]

Relief short of declaring plaintiff a free agent must be considered. Less drastic relief might be to rescind plaintiff's assignment to the Philadelphia Club and prohibit St. Louis from further assigning plaintiff's contract during the pendency of this suit. In his reply to defendant's papers in opposition plaintiff in fact suggests that St. Louis represents the status quo. Rather than wholly suspending the operation of the reserve system its effect would be confined to suspending the operation of the assignment provisions. We believe that such an alternative may offer plaintiff greater hope for success at this preliminary stage.

As we see it, the last actual non-contested status of the parties prior to this dispute saw plaintiff under a contract to the St. Louis Club, but one which was by its terms assignable. The present status of plaintiff's contract assigned to the Philadelphia Club by the St. Louis Club is therefore consistent with the status quo.[17] Were we to rescind plaintiff's assignment to the Philadelphia Club, restore plaintiff's prior contractual position with the St. Louis Club, and prohibit St. Louis from further assigning plaintiff's contract, we would fundamentally alter the prior status of the parties. The St. Louis Club would only have the option of renewing plaintiff's contract or terminating his employment (which would make plaintiff a free agent).

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[16] *Washington Capitols Basketball Club, Inc.* v. *Barry*, 304 F.Supp. 1193, 1196–97 (N.D. Cal. 1969).

[17] Compare *Washington Capitols Basketball Club, Inc.* v. *Barry*, *supra*.

In our view then, interference at this point with the assignability of plaintiff's contract does not preserve the status quo; it accords plaintiff a new status.

Furthermore, we perceive no tenable distinction between plaintiff and any other ballplayer whose contract for the coming season may have been or may yet be assigned to another club and who might desire similar relief.[18] Granting plaintiff relief pending the outcome of this suit might well effect a moratorium on all trading among baseball clubs. Such potential for disruption of long-standing practices of organized baseball cannot be fairly termed preservation of the status quo.[19]

Preliminary relief to plaintiff would not serve to preserve the status quo. Nevertheless, without regard to preserving the status quo, preliminary relief may be ordered if there is a sufficient showing of potential irreparable harm to the plaintiff.[20] Such instances are rare, however, and the burden on plaintiff is very demanding.

B. *Balance of Hardships*

1. Irreparable Harm to Plaintiff

Irreparable harm means irremediable injury that is certain and great.[21] If plaintiff is denied this preliminary relief he will indeed suffer serious consequences. He alleges that he will not play for the Philadelphia Club be-

[18] Though it seems to us that this class would probably be more restricted in size than the players who, if plaintiff were granted "free agent" status, might be accorded similar relief.

[19] See *Carroll* v. *American Fed. of Musicians*, 295 F.2d 484, 486 (2d Cir. 1961).

[20] See *Ross-Whitney Corp.* v. *Smith Kline & French Lab.*, 207 F.2d 190, 199 (9th Cir. 1953). Cf. *Unicon Management Corp.* v. *Koppers Co.*, *supra* at 204.

[21] *Federal Maritime Com'n* v. *Atlantic & Gulf/Panama Canal Zone*, 241 F.Supp. 766, 781 (S.D.N.Y. 1965).

cause it would uproot his long-established social and communal ties in St. Louis, remove him from the scene of three portrait studios he is operating in St. Louis, and most importantly destroy his personal dignity because he would feel that he had allowed himself to be "sold as a chattel." [22]

If he does not play baseball for Philadelphia, then by virtue of the operation of the reserve system he will be barred from professional baseball. Plaintiff's outstanding baseball talents will decline over the years; he is presently thirty-one years of age and at the prime of his career. Loss of any one of his remaining baseball years is irreparable, especially so since plaintiff avers that his skills may deteriorate more rapidly with disuse.

Plaintiff's argument is compelling, but contains a basic flaw. Plaintiff is not wholly excluded from baseball. He has been offered a contract by the Philadelphia Club for the 1970 season at the same $90,000 salary he earned at St. Louis. It is his *choice* not to play baseball. He has a duty to mitigate his damages. Accordingly, we must view his potential injuries not as those which may occur if he chooses not to play baseball, but as those which he will nonetheless suffer if he does play baseball.

These injuries which are set forth above as the reasons why plaintiff does not intend to play for Philadelphia are themselves substantial and to some extent irreparable. Thus plaintiff can never be adequately compensated by money damages for what appears to be a genuine feeling of loss of personal dignity if he continues to be employed under a system which affords him no freedom of choice as to his employer. What weight can a system of law give to this feeling which other ballplayers also operating under such strictures may or may not feel? Plaintiff is not being

[22] Affidavit of Curtis C. Flood, January 16, 1970, p. 3.

asked to surrender his right either to the maintenance of this lawsuit,[23] or, if he is found entitled, to his final relief.

Plaintiff will suffer undoubted loss of social and communal ties to St. Louis which he has developed during his twelve years as a ballplayer there. Additionally, his outside business interests in St. Louis may well suffer. These interests are both substantial, although the latter may be subject to monetary compensation and there appears no reason to expect that plaintiff could not develop similar social and business interests elsewhere.[24] In this regard, we observe that the relief ultimately sought by plaintiff would not and could not compel the St. Louis Club to retain his services. He seeks to become a "free agent" which might or might not result in his remaining in St. Louis. Were he to contract to play for any club except St. Louis, these losses would be the same he would suffer playing for Philadelphia.

2. Harm to Defendants

In weighing the equities, we must consider the potential harm to defendants and others if this injunction is granted pending a trial of the issues.

Two substantial potential injuries seem apparent. First, the trade of which plaintiff was a part, involved an exchange of four ballplayers for the St. Louis Club (including plaintiff) for three for the Philadelphia Club. The other six players may already have acted in reliance upon this transfer (relocating themselves and their families, etc.). Were we to declare plaintiff a free agent or return him to St. Louis, the position of these players might be thrown

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[23] We fail to see and are not informed by plaintiff why or how his playing for the Philadelphia Club would, as he suggests, affect his right to maintain this lawsuit for injunctive relief. Playing pursuant to a contract executed under protest and for the sole purpose of mitigating damages would not appear to constitute a waiver or estoppel of any kind.

[24] Compare, *Washington Capitols Basketball Club* v. *Barry*, *supra* at 1202.

into doubt. In this regard, though not so significant as the reliance interests of the players involved, the respective ball clubs in consummating this trade and in planning their player requirements have also relied upon their right to assign player contracts.[25]

Second, as we recognized in assessing the status quo there is danger that the grant of a preliminary injunction to plaintiff might result in similar relief being accorded other ballplayers who might seek it. At the very least there is a strong possibility that considerable litigation, with potential for interfering with the operation of the 1970 baseball season, might be precipitated by the granting of plaintiff's motion.

3. Weighing the Equities

We do not believe that plaintiff has made a strong showing of irreparable injury and are unable to conclude that the balance of hardships tips decidedly in his favor.

C. *Probability of Success at Trial*

Seeking relief which he would normally be entitled to only if he prevailed after a full trial and which would fundamentally alter the status quo, and failing to tip the scale of equities clearly in his favor, plaintiff must establish clear and unmistakable probable success on the merits before we can consider exercising our discretion to grant him a preliminary injunction.

1. The Federal Antitrust Claim

Plaintiff contends the reserve system is an unreasonable restraint of trade in violation of Sections 1 and 2 of the Sherman Act because the teams collectively agree to contract with players only on uniform terms and agree to

[25] Of course, this in no way implies that plaintiff has no right to retire.

divide the player market by giving each team exclusive rights to bargain with its players and because it is enforced by group boycott and concerted refusal to deal on the part of all professional teams against any player seeking to escape its restrictions.

a. Baseball's federal antitrust exemption

Plaintiff's federal antitrust claim is appealing,[26] but in light of the consistent and clear holdings of the Supreme Court that baseball is not subject to the federal antitrust laws (no matter how illogical such holdings may appear to some by reason of subsequent events), the final outcome of this litigation is doubtful to say the least—indeed plaintiff has a formidable hurdle to leap to achieve ultimate success.

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[26] See, *e.g.*, Comment, "Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws," 62 Yale L.J. 576, 622–624 (1953); Note, "'The Super Bowl and the Sherman Act: Professional Sports and the Antitrust Laws," 81 Harv. L.Rev. 418, 426 (1967). Concerted refusals to deal have frequently been held *per se* violations of the Sherman Act. See *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners, Inc.* v. *Peoples Gas Co.*, 364 U.S. 656 (1961); *Klor's Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Fashion Originators Guild* v. *FTC*, 312 U.S. 457 (1941); *American Medical Ass'n* v. *United States*, 130 F.2d 233, 248–49 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943). We are impressed by defendants' argument that the rule of reason should govern here, however, since it is generally conceded that some form of reserve system is essential to the very maintenance of the "joint venture" of organized professional baseball. See *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918); *Deesen* v. *Professional Golfers Ass'n.*, 358 F.2d 165 (9th Cir. 1966); *Molinas* v. *National Basketball Ass'n.*, 190 F.Supp. 241 (S.D.N.Y. 1961). Nevertheless, the baseball reserve rule appears excessively restrictive (far beyond that necessary to protect its aims of insuring stability of team membership, maximizing fan interest, and protecting club investments in player development). Less restrictive alternatives have been adopted in football, basketball and other professional sports. Accordingly, there appears a strong likelihood that the reserve system would be held an unreasonable restraint of trade.

In 1922 in *Federal Baseball Club of Baltimore* v. *National League*,[27] the Supreme Court faced with an attack on the validity of the reserve system held that the business of professional baseball was not within the scope of the federal antitrust laws because the exhibitions were purely state affairs, were not trade or commerce in the ordinarily accepted use of the words, and the interstate transportation of players was merely incidental. In 1949, the Second Circuit in reversing dismissal of the complaint in *Gardella* v. *Chandler*[28] held (per L. Hand, J.) that baseball may by then have become interstate commerce and subject to the antitrust laws, and (per Frank, J.) that the concept of commerce on which *Federal Baseball* was based had been wholly eroded by subsequent decisions.

When this question again reached the Supreme Court in 1953 in *Toolson* v. *New York Yankees, Inc.*,[29] the Court, without re-examining the underlying issue of interstate commerce, reaffirmed its prior decision in *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." The reasons assigned for that conclusion were that baseball had developed for thirty years in reliance on its "understanding that it was not subject to existing antitrust legislation;" that Congress had not seen fit to bring baseball under the antitrust laws "by legislation having prospective effect;" that the existing legislation should not be held applicable with "retrospective effect;" and that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."

Subsequent decisions established that *Toolson* "was a narrow application of the rule of *stare decisis*" applicable

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[27] 259 U.S. 200.

[28] 172 F.2d 402.

[29] 346 U.S. 356.

only to baseball and to no other industry or professional sport.[30] Specifically, four years after *Toolson*, in *Radovich* v. *National Football League*,[31] the Supreme Court held the antitrust laws applicable to professional football and its reserve system, while continuing to distinguish baseball as the only sport encompassed within a prior direct determination in *Federal Baseball* to the contrary.

This development of an antitrust exemption for baseball, and baseball alone, is much-criticized, yet in *Radovich* the Supreme Court specifically addressed itself to this:

> "If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time on a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance." (footnote omitted)[32]

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[30] *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *United States* v. *International Boxing Club*, 348 U.S. 236 (1955); *United States* v. *Shubert*, 348 U.S. 222 (1955).

[31] 352 U.S. 445.

[32] 352 U.S. at 452.

As of this date, Congress has not legislated to bring baseball within the federal antitrust laws. In the face of this unusual but very specific delegation of Congress, plaintiff has no choice but to seek to have *Toolson* overruled.

Plaintiff suggests four developments which might lead to an overruling of *Toolson*. First, he argues that the principle of freedom of contract in the labor market recognized by federal labor legislation must illuminate any interpretation of the antitrust laws and that this factor was not brought to the attention of the Supreme Court. However, the similar policy of freedom of contract set forth in the Thirteenth Amendment was expressly relied upon by Judge Frank of our Circuit in 1949 in *Gardella* v. *Chandler* as the reason why, in his view, the reserve system is "so opposed to the public policy of the United States that, if possible, [it] should be deemed within the prohibitions of the Sherman Act. . . ." [33]

The Supreme Court was fully cognizant of that decision when *Toolson* was decided. Furthermore, the federal labor statutes and *United States* v. *Hutcheson* [34] on which plaintiff relies were cited throughout the briefs to the Supreme Court in *Toolson*, although for the different proposition that the alleged violation was a labor dispute exempt from the antitrust laws.[35]

Second, petitioner refers to the very substantial increment in both the revenue and coverage baseball has received from radio and television since 1953 and baseball's involvement with other enterprises generally, as evidence

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[33] 172 F.2d at 410.

[34] 312 U.S. 219 (1941).

[35] Brief for Respondents in Opposition to Petition for Certiorari, pp. 37–40; Petitioner's Reply Brief on Writ of Certiorari, pp. 5–11; Brief for Respondents, pp. 64–66.

of its changing character. This argument appears more relevant to the question of interstate commerce [36] than to the issue of *stare decisis* on which *Toolson* is based. Moreover, the briefs of all parties [37] and Justice Burton's dissent [38] in *Toolson* gave considerable attention to the blossoming since the time of *Federal Baseball* of radio and television revenues for baseball.

Third, he points out that the baseball player draft begun in 1965 operates to deprive any new player desiring to enter professional baseball the right to even an initial choice where, among the various teams that may desire his talents, he will begin his playing career.[39] While the player draft does further increase the restrictions already placed

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[36] The Supreme Court in *Toolson* indicated that its decision to continue baseball's antitrust immunity did not rest upon any view that baseball was not interstate commerce. We believe that baseball clearly constitutes a subject of commerce under the present concept of that term. See *e.g., NLRB* v. *Jones & McLaughlin Steel Corp.*, 301 U.S. 1 (1937). Further, in light of *Radovich* and the expansion since 1922 of the concept of interstate commerce, we have no doubt that baseball is in interstate commerce. See *State* v. *Milwaukee Braves Inc.*, 144 N.W. 2d 1 (1966).

[37] *e.g.*, Petitioner's Opening Brief on Writ of Certiorari, pp. 38–43; Brief for Respondents, pp. 41–54; Brief for Petitioners (in companion case of *Corbett* v. *Chandler*), pp. 9–15.

[38] 346 U.S. at 357–59.

[39] It has been suggested that the baseball draft is considerably less restrictive than the draft systems of other professional sports. See Note, "Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws," 81 Harv. L.Rev. at 423, 425.

Defendants argue that in any event the draft system was initiated long after plaintiff entered baseball and thus he lacks standing to raise this contention. We are inclined to disagree with defendants since plaintiff concededly has standing to attack the reserve system and merely wishes to establish as grounds for overruling *Toolson* that its effect has become more restrictive as a result of the draft. At least for purposes of this motion this question is resolved in plaintiff's favor.

on a player's freedom to negotiate, the fact that his freedom is now curtailed in the first year of his playing career as well as in every subsequent year does not appear to fundamentally add to the lifelong restraints which were already in existence at the time of *Toolson*. In any event, this additional restriction still does not present as severe a situation as faced the Supreme Court in *Toolson* itself. The complainants there were not merely restricted to one major league club; they were allegedly ostracized and totally barred from pursuing their livelihood in professional baseball.

Fourth, plaintiff argues that the impact of a retroactive decision, which was a principal factor leading the Supreme Court in *Toolson* to continue baseball's exclusion from the federal antitrust laws, need no longer be feared since plaintiff seeks only prospective relief. He argues that recent prospective decisions in the area of criminal law [40] foreshadow the possibility of similarly limiting any and all civil relief which may flow from a declaration of the illegality of the reserve system. It may very well be that a court could limit plaintiff and all others who may seek to hold defendants accountable for antitrust violations to injunctive relief and refuse to permit retroactive treble damages where the alternative to such a prospective holding would be to dismiss all claims because of defendants' justifiable reliance on past precedents.

While the latter may be a weighty argument for overruling *Toolson*, it is not our function to make that decision at this phase of the litigation.[41] The issue now before us, as already noted, is to determine the existing likelihood of that eventuality. Several weighty factors compel the conclusion

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[40] Compare, *e.g.*, *Desist* v. *United States*, 394 U.S. 244 (1969).

[41] As to the power of a lower federal court to "divine" whether a decision of the Supreme Court would be overruled on appeal, see *Gardella* v. *Chandler*, *supra* at 409 n.1 (Frank, J.).

that the overruling of *Toolson* is by no means the probable result of this litigation.

While we believe a decree in the civil area limiting not only plaintiff but all other litigants to prospective relief (despite the presence of a statute granting treble damages) in order to protect defendants' legitimate reliance interests would be salutory, we must nevertheless recognize that it would also be novel and nearly unprecedented. It is not at all certain that such a course will be adopted; yet without it plaintiff is largely left in the difficult position of simply arguing the illogic of Toolson's *stare decisis* reasoning in the face of the Supreme Court's previous determination in *Radovich* that while the baseball exemption may be illogical, if it is to be corrected Congress must do so.

Moreover, defendants contend that, regardless of whether or not past damages are awarded, a declaration that the reserve system is illegal and a grant of injunctive relief forbidding refusals to negotiate would still have a serious retrospective effect on the reliance interests of defendants. They assert that countless committments have been made by all teams in organized baseball in reliance upon the validity of baseball's reserve system and exemption from federal antitrust laws.[42] Yet, they argue, while plaintiff concedes the need for some form of reserve system, the relief he seeks would result in a sudden termination of the present reserve system with the court lacking power to devise a substitute.

There is considerable force to defendants' position in this regard. The Supreme Court in *Radovich* elucidated the factors leading to its decision in *Toolson*:

> "In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball*. The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at

[42] See Affidavit of Joseph E. Cronin, February 1, 1970.

best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the court to the practical result that it would sustain the unequivocal line of authority reaching over many years." [43]

We do not believe the "prospective overruling suggested by plaintiff would vitiate all of these underpinnings of *Toolson*.

In *Radovich* the Supreme Court further specified that *Toolson* sought to avoid not only the "injustices of retroactivity" but also of "*surprise* which might follow court action." [44] The Supreme Court reasoned that Congress as opposed to the courts might avoid such sudden effects because its "processes are more accommodative" and "[t]he whole scope of congressional action would be known long in advance and *effective dates* for the legislation could be set in the future." [45]

Additionally, Congress' silence in the face of the Supreme Court's extraordinary invitation in *Toolson, Shubert* and finally *Radovich* to modify baseball's status may take on aspects of ratification.[46] Plaintiff correctly draws our attention to the general rule that the silence of Congress is of slight significance. However, we cannot ignore the unique

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[43] 352 U.S. at 450.

[44] *Radovich* v. *National Football League*, 352 U.S. at 452 (emphasis added).

[45] *Id.* See generally, Comment, "Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws," 62 Yale L.J. at 636, 638–39.

[46] See *State* v. *Milwaukee Braves Inc., supra.*

attention paid in these three cases to the inactivity of Congress.[47]

Finally, decisions of the Supreme Court are not lightly overruled, particularly those which have a history as long as this one. The *Toolson* decision may be an anomaly, and there may (hopefully) be few such anomalies long-sustained by the law. Nevertheless, whatever may be our individual view of the "rightness" of plaintiff's claim, we are constrained to find that plaintiff has not made a sufficiently clear showing of reasonable likelihood of overruling the Supreme Court's direction that the corrective process lies with Congress and not with the courts.[48] Quite possibly plaintiff may succeed in ultimately overturning baseball's federal antitrust exemption, but it is not sufficiently probable now to justify the extraordinary preliminary relief he seeks.[49]

b. Antitrust exemption for labor agreements

There is yet another substantial and complicated issue of law and fact between the parties which if resolved in defendants' favor would bar plaintiff from pressing his

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[47] See, *e.g.*, *United States* v. *Shubert*, *supra* at 229–230 where the Supreme Court stated:

> "And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation."

[48] *Portland Baseball Club Inc.* v. *Baltimore Baseball Club Inc.*, 282 F.2d 680 (9th Cir. 1960); *Salerno* v. *American League*, 1970 CCH Trade Cases ¶72,996 (S.D.N.Y. 1969) (dismissing complaints).

[49] In *Martin* v. *National League Baseball Club*, 174 F.2d 917, 918 (2d Cir. 1949), the Second Circuit, after having held baseball subject to the antitrust laws (after *Federal Baseball*, but prior to *Toolson*), nevertheless refused to issue a preliminary injunction on behalf of a player excluded from professional baseball because the question of the legality of the reserve system "may involve consideration, among other things, of the needs and conduct of the business as a whole."

claim for federal antitrust relief from the reserve system. Defendants contend that the reserve system is embodied in their collectively bargained agreement with the Major League Baseball Players Association; that it is a mandatory subject of collective bargaining presently under negotiation and examination between defendants and the Players Association; and that, as a consequence, the subject of this lawsuit is a matter exempt from the antitrust laws.[50]

Plaintiff, on the other hand, appears to concede that the reserve system is a mandatory bargaining subject. He argues that the Basic Agreement of the Players Association and the defendants does not comprise any present collectively bargained agreement regarding the reserve system;[51] further, that the reserve system has been imposed upon the players by the defendants without their consent and is not the result of collective bargaining.[52] Finally, he

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[50] Clayton Act §20, 29 U.S.C. §52; Norris LaGuardia Act, 29 U.S.C. §§101–115. See *United States* v. *Hutcheson*, 312 U.S. 219 (1941); *Meat Cutters* v. *Jewel Tea*, 381 U.S. 676, 689–91 (1965); *Federation of Musicians* v. *Carroll*, 391 U.S. 99, 105–106, 110 (1968).

[51] Although the Basic Agreement is somewhat internally inconsistent on this question (the Players Association agrees generally to the form of the Uniform Player Contract and to use their best efforts to ensure that all of its terms and conditions will be carried out in full), we are of the opinion solely on the basis of that which is before us that plaintiff is probably correct that the reserve system is not presently collectively agreed to. Article VIII of the Basic Agreement specifically provides for a joint review of possible alternatives to the reserve clause (which review is underway) and that the clubs shall not be obligated to bargain or seek agreement with the Players Association with respect to the reserve clause during the term of the Agreement (which is still in effect).

[52] Plaintiff may also be seeking to escape this often difficult process of reconciliation of labor and antitrust laws by contesting defendants' good faith in the present bargaining over the reserve system.

It would appear to us that the recourse for any failure by defendants to bargain in good faith should be to the National Labor

reasons that defendants are merely seeking to use this alleged labor agreement as "a cat's-paw to pull [their] chestnuts out of antitrust fires." [53]

The questions raised by the conflicting views of the parties as to a labor agreement exemption are substantial and complex. They afford yet another reason to conclude that plaintiff has failed to meet his burden of a clear showing of probability of success on the federal antitrust claims.

2. State Law Claims

Should he fail on the federal antitrust claim, plaintiff asserts in two separate causes of action that the reserve system nevertheless violates state law, both common and statutory. Choosing not to rest upon pendent jurisdiction, he alleges diversity of citizenship as the basis for federal jurisdiction. Here again, however one views the reasonable probability of success on his state statutory antitrust and common law claims he is confronted with the strong possibility that such claims are barred by federal preemption or the need for uniformity of regulation.

a. The supremacy and commerce clauses

Plaintiff argues that defendants cannot have it both ways: that if the federal antitrust laws do not reach baseball then the state antitrust laws and common law are applicable.

Relations Board which has recently asserted its jurisdiction over the defendant baseball employers. See *American League and Association of Umpires*, 180 NLRB No. 30, Case 1–RC–10414 (December 15, 1969). In any event, this contention serves to emphasize the serious and difficult factual questions on this issue of collective bargaining between the parties.

[53] *United States* v. *Women's Sportswear Ass'n.*, 336 U.S. 460, 464 (1949). See *Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.*, 325 U.S. 797 (1945); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

Toolson, however, was based not on any supposed absence of interstate commerce, but on *stare decisis* and the acquiescence of Congress. In *State* v. *Milwaukee Braves Inc.*,[54] the Wisconsin Supreme Court held that state antitrust laws could not be applied to prevent transfer of a baseball franchise on the ground that state regulation was foreclosed by the Commerce and Supremacy Clauses of the United States Constitution. Certain of the majority were of the opinion that state regulation was preempted because it would interfere with a Congressional policy permitting self-regulation for baseball which they saw as implicit from the silence of Congress in this particular context.[55] Others in the majority preferred the view that the national character of organized baseball and the necessary interdependence of the teams requires uniformity of regulation and that "since organized baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress."[56]

We are of the opinion that plaintiff has failed to show sufficient likelihood that his state claims will not be barred by either federal preemption or the need for uniformity of regulation in an area of interstate commerce.[57] Although transfer of a team franchise is certainly distinguishable (particularly with regard to the likelihood of state discrimination in favor of its own economic interests) from

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[54] 31 Wis. 2d 699, 144 N.W. 2d 1 (1966). See also, *Musicians Union* v. *Superior Court*, 73 Cal. Rptr. 201, 447 P 2d 313, 317-18 (S. Ct. 1968).

[55] *Id.* at 17–18.

[56] *Id.* at 18.

[57] See generally, 8 B.C. Ind. & Com. L. Rev. 341 (1967); 35 Fordham L. Rev. 350 (1966).

Moreover, we have already noted that defendants raise a substantial issue as to their claim that the reserve system is a subject of collective bargaining. If this be so, then this would present yet another basis for finding federal preemption. See *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959).

restraints imposed by the reserve system upon players' freedom to negotiate, the reasoning of *Milwaukee Braves* still seems persuasive here.[38] From the information before us at this preliminary stage, there does appear to be a need for uniformity of treatment in a nationally organized professional team sport like baseball. We recognize that this leaves baseball unregulated by state or federal antitrust law, yet we are constrained to find that such a result appears to us mandated by existing and controlling law.

b. Indispensable parties

In light of our determination above that plaintiff has failed to sustain his burden at this preliminary stage of showing probable success on his state law claims, we find it unnecessary to pass upon defendants' further contention with respect to lack of indispensable parties who, if joined, would destroy diversity of citizenship jurisdiction.

3. Involuntary Servitude

Plaintiff's fourth cause of action asserts that the reserve system violates the Thirteenth Amendment and federal civil rights statutes, 18 U.S.C. §1581 and 42 U.S.C. §1924, thereunder by imposing upon him a condition of involuntary servitude and violates the public policy declared in the Norris LaGuardia Act, 29 U.S.C. §§102 and 103, by refusing him the right to negotiate his terms and conditions of employment. Although none of these statutes expressly pro-

[38] In *State v. Milwaukee Braves Inc.*, 144 N.W. 2d at 15 the Court in broad, but persuasive dicta stated:

> "We venture to guess that this exemption does not cover every type of business activity to which a baseball club or league might be a party and does not protect clubs or leagues from application of the federal acts to activities which are not incidental to the maintenance of league structure, but it does seem clear that the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it."

vide for a civil remedy, jurisdiction to grant relief for a violation of such provisions may be found in 28 U.S.C. §§1331 and 1343.[59]

Plaintiff's claims in this regard appear to have only dubious validity. He relies principally on the 1914 decision of a New York Supreme Court,[60] which is quoted with approval by Judge Frank in *Gardella* v. *Chandler*.[61] Judge Frank recognized that terming the reserve system "peonage" was "perhaps a bit exaggerated" and concluded that "I am not to be understood as implying that [it] violate[s] the Thirteenth Amendment or the statutes enacted pursuant thereto."[62]

Involuntary srvitude has been narrowly defined. Plaintiff points to the broad statement of the Supreme Court in *Pollock* v. *Williams*:[63]

> "The undoubted aim of the Thirteenth Amendment as implimented by the Antipeonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."

Immediately following that general proposition, the Supreme Court in *Pollock* specified its holding:

> "Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This Congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor."[64]

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[59] See *Bryant* v. *Donnell*, 239 F.Supp. 681, 683 (W.D. Tenn. 1965). See also *Bell* v. *Hood*, 327 U.S. 678 (1946).

[60] *American League Baseball Club* v. *Chase*, 86 Misc. 441, 465, 149 N.Y.S. 6, 19 (1914).

[61] 172 F.2d 402, 409–10 (2d Cir. 1949).

[62] *Id.* at 410.

[63] 322 U.S. 4, 17 (1944).

[64] *Id.* at 18.

Plaintiff has not satisfied what appears to be an essential prerequisite to this cause of action, a showing of compulsory service, for he is free to quit and refuse to play ball for Philadelphia (even though the consequence of that choice may be to foreclose him from playing professional baseball).[65] We do not believe he has demonstrated a reasonable probability of success on this claim.

4. No Showing of Reasonable Probability of Success

With regard to each of the four relevant claims asserted by plaintiff, we are constrained by controlling precedents to find that he has not shown sufficient probability of ultimate success to justify granting the only relief plaintiff seeks at this time—the issuance of a preliminary injunction.

II

INJUNCTIONS PROHIBITED

Defendants' final argument for denial of a preliminary injunction is that apart from questions of irreparable injury and probable success, the activities sought to be enjoined involve or grow out of a "labor dispute" [66] and in such cases this court has no jurisdiction to issue the injunction sought by plaintiff.[67]

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[65] See *Wicks* v. *Southern Pacific Co.*, 231 F.2d 130, 138 (9th Cir.), cert. denied 351 U.S. 946 (1956); *United States* v. *Shackney*, 333 F.2d 475 (2d Cir. 1964); *Bryant* v. *Donnell, supra* at 685.

[66] Norris LaGuardia Act §§13(a) and (c), 29 U.S.C. §§113(a) and (c).

Defendants contend that the reserve system is acknowledged to be a mandatory bargaining subject and plainly concerns "terms and conditions of employment" and, thus, must constitute a labor dispute.

[67] Clayton Act §20, 29 U.S.C. §52; Norris LaGuardia Act §§4 and 5, 29 U.S.C. §§104(a) and 105. See *Clune* v. *Publishers Association of N.Y. City*, 214 F.Supp.520 (S.D.N.Y.), aff'd, 314 F.2d 343 (2d Cir. 1963).

Whether plaintiff's action grows out of a labor dispute and, if so, whether injunctive relief against a boycott in restraint of trade might nevertheless be permitted here under the authority of *Allen Bradley Co.* v. *Local Union No. 3, I.B.E.W.*,[68] present substantial, complicated and difficult questions of fact and law.[69] It is appropriate here to recall that our circuit has cautioned that "there is a special need for restraint in granting interlocutory relief" in antitrust actions involving an alleged labor dispute "where courts must resolve the somewhat conflicting policies of four acts of Congress, two of which explicitly deprive a federal court of 'jurisdiction' to issue an injunction. . . ."[70]

III

Conclusion

For years professional ballplayers have chafed under the restrictions of baseball's reserve system; a long line of

[68] 325 U.S. 797 (1945).

[69] The Supreme Court evidently disagreed with somewhat similar arguments put forth by the defendants in *Radovich* v. *National Football League*, 352 U.S. 445 (1957). In *Radovich* one of respondents arguments for affirmance of the lower court's dismissal of the complaint was that the claimed illegality of professional football's reserve system under which the petitioner was barred from football constituted a labor dispute and was exempt from the antitrust laws. See Brief for Respondents, pp. 53–63; Petitioner's Reply Brief, pp. 20–21. The Supreme Court, in holding professional football subject to federal antitrust laws and the complaint improperly dismissed, stated, "[r]espondents' remaining contentions we believe to be lacking in merit." 352 U.S. at 454.

It is significant, however, that neither party in *Radovich* claimed that the reserve system was a product of or subject to collective bargaining. See generally, Comment, "Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws," 62 Yale L.J. at 619–20, 635–36 (in 1953 in baseball there was also apparently no negotiation or consultation with the players regarding the uniform contract).

[70] See *Carroll* v. *American Fed. of Musicians*, 310 F.2d 325 (2d Cir. 1962).

litigation so attests. Many of their grievances appear justified. Yet, regretfully, as the Supreme Court stated in *Radovich* we are not writing here on a clean slate. Recognizing the equity of plaintiff's claims, we must also recognize the existing, well-established and controlling precedents against his position.

If plaintiff is to achieve by court action the fundamental change he seeks in the reserve system, then we believe that such a determination on a matter of vital importance to organized baseball and with such potential for opening the floodgates to litigation must at least be the result of a full trial and not on the basis of a motion for preliminary relief.[71] To grant plaintiff the preliminary injunction he seeks would work the type of unfair surprise and carry the same sort of sudden effect that the Supreme Court in *Toolson* was at such pains to prevent.

Accordingly, we are constrained to deny plaintiff's motion for the extraordinary remedy of a preliminary injunction. As a matter of law, we are powerless to hold otherwise.

So Ordered:

New York, N.Y.
March 4, 1970

|s| Irving Ben Cooper
United States District Judge

[71] *Martin* v. *National League*, 174 F.2d 917 (2d Cir. 1949).

CURTIS C. FLOOD

v.

BOWIE K. KUHN, *et al.*

70 Civ. 202

Plaintiff seeks an order providing for an early trial.

Since the return day of the motion, all proceedings in the case, including trial of the action and rendition of judgment have been assigned to us (see order of the Chief Judge, filed March 13, 1970).

We see merit in, and accordingly grant, the application. Date for trial to be fixed after consultation with counsel in the case.

SO ORDERED:

New York, N.Y.
March 25, 1970

|s| IRVING BEN COOPER
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

70 Civ. 202

CURTIS C. FLOOD, *Plaintiff*,

– against –

BOWIE K. KUHN, Individually and as Commissioner of Baseball, CHARLES S. FEENEY, Individually and as President of the National League of Professional Baseball Clubs, JOSEPH E. CRONIN, Individually and as President of the American League of Professional Baseball Clubs, ATLANTA BRAVES, INC., CHICAGO NATIONAL LEAGUE BALL CLUB, THE CINCINNATI REDS, INC., THE HOUSTON SPORTS ASSOCIATION, LOS ANGELES

DODGERS, INC., MONTREAL BASEBALL CLUB LTD., METROPOLITAN BASEBALL CLUB, INC., PHILADELPHIA NATIONAL LEAGUE CLUB, PITTSBURGH ATHLETIC CO., INC., ST. LOUIS NATIONAL BASEBALL CLUB, INC., SAN DIEGO PADRES, SAN FRANCISCO GIANTS' BASEBALL CLUB, BALTIMORE BASEBALL CLUB, INC., BOSTON RED SOX, CLEVELAND INDIANS, INC., DETROIT BASEBALL CLUB, NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., GOLDEN WEST BASEBALL CO., CHICAGO WHITE SOX, KANSAS CITY ROYALS BASEBALL CLUB, MINNESOTA TWINS, INC., OAKLAND ATHLETICS, and PACIFIC NORTHWEST SPORTS, INC.

Defendants.

Opinion

COOPER, District Judge,

Each defendant herein to the extent named in plaintiff's first four causes of action moves to dismiss such claims for lack of jurisdiction over the subject matter, for failure to state a claim upon which relief can be granted, and, as to the second and third causes of action only, for failure to join indispensable parties, pursuant to Rule 12(b) (1), (6), and (7), F.R.Civ.P. Both defendants named in the fifth cause of action move alternatively for dismissal of that claim on the first two of the above-stated grounds, or for summary judgment pursuant to Rule 56, F.R.Civ.P. Each of the first four causes of action attack baseball's reserve system. The fifth cause of action alleges certain unrelated antitrust violations on the part of two defendant baseball clubs.

First Four Causes of Action

[1] Turning first to the motions to dismiss the first four causes of action, dismissal on the pleadings for want of jurisdiction would be appropriate only if plaintiff's claims of federal jurisdiction were unsubstantial or frivolous. Cf. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939

(1946). We cannot so hold. See generally, our Opinion herein filed March 4, 1970 denying plaintiff's motion for a preliminary injunction, 309 F.Supp. 793 (hereinafter "Opinion").

After considerable reflection we also conclude that any decision on the motions to dismiss for failure to state a claim must be deferred until trial. See Rule 12(d), F.R.Civ.P. With regard to the first cause of action alleging violation of the federal antitrust laws, plaintiff asserts grounds for overruling Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953) which in our view raise serious questions of a factual nature. See Opinion. By the same token we are of the belief that defendants raise substantial issues of fact as to whether this matter is properly a labor dispute exempt from the antitrust laws.[1] *Id.* To obtain a clear view, the proper judicial course requires that these issues—important to all of organized baseball and of great public interest—not be resolved without full consideration of all the facts best adduced at trial. See 2A Moore, Federal Practice ¶ 12.16 at 2356 and 2357 (2d ed. 1968). See also, United States v. Central States Theatre Corp., 159 F.Supp. 552 (D.Neb.1957); Gaus v. Huston, 35 F.Supp. 327, 330 (N.D.Iowa1940).

Further, we believe the trial must encompass the factual issues raised respecting the reserve system—hailed as a blessing by proponents; condemned as destructive by antagonists. We have ordered ~~an early trial herein~~ (May 19, 1970); the considerations which impelled that decision like-

[1] We are not satisfied that, as defendants contend, this matter is properly within the primary jurisdiction of the National Labor Relations Board. Assuming that the reserve system is a mandatory bargaining subject and that there is good faith bargaining thereon, nevertheless we believe the underlying issue of whether this is a labor dispute exempt from the antitrust laws is still present. See *Opinion*. In any event, this question is best resolved after a thorough inquiry at trial. See *Montgomery Ward & Co.* v. *Schumacher*, 3 F.R.D. 368, 370 (N.D. Cal. 1944).

wise weigh heavily in favor of developing all of the facts at one trial so as to avoid the possibility of piecemeal determinations and consequent delay. Additionally, exploration of the operation and effect of the reserve system is vital to any determination respecting plaintiff's fourth cause of action based on involuntary servitude. Potentially, it may also illuminate the question of the continued vitality of baseball's judicially-derived antitrust exemption.[2] Cf. United States v. Central States Theatre Corp., *supra*, 159 F.Supp. at 555.

[2] Accordingly, in light of the circumstances of this case we order that the hearing and determination of the defenses raised pursuant to Rule 12(b) (1), (6) and (7), F.R.Civ.P., be deferred until trial "to permit the Court to take a larger scope of vision than that merely stated in the pleading." Kaus v. Huston, 35 F.Supp. at 330. See United States v. Central States Theatre Corp., 159 F.Supp. at 554–555.

Fifth Cause of Action in General

We are faced now with defendants' motions in the alternative for either dismissal or summary judgment in their favor as to plaintiff's fifth cause of action. It asserts two federal antitrust claims[3] unrelated to the reserve system:

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[2] Since the trial must in any event explore the reserve system we see no reason not to defer determination of defendants' motions as to the second and third cause of action for violations of state law. With regard to defendants' motion pursuant to Rule 12(b) (7), F.R.Civ.P. to dismiss for failure to join an indispensable party whose joinder would destroy diversity of citizenship, see *Gibraltar Productions* v. *RKO Teleradio Pictures*, 159 F.Supp. 457 (S.D.N.Y. 1958) (deferring such question until trial because of the issues of fact regarding indispensability).

[3] We note that baseball's federal antitrust immunity appears to play no role where, as here, the violation claimed is unrelated to the maintenance of league structure; certainly so where outside business interests are the subject of the complaint as they are in this fifth cause of action. Cf. *State* v. *Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1, 15 (1966).

the first against the St. Louis National Baseball Club Inc. (St. Louis Club) and the second against the New York Yankees, Inc. (New York Yankees).

In light of the affidavits defendants submit and rely upon which are in no wise rebutted by plaintiff we believe it appropriate to direct our attention solely to the motion for summary judgment. Plaintiff in fact submits no papers whatever in opposition thereto. As to each of the two claims, he is in effect content to rest upon the facts set forth in defendants' affidavits filed herein and, to the extent not rebutted by such affidavits, the allegations of his complaint.

Applicable is Rule 56(e), F.R.Civ.P. which provides in part:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials in his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

At a conference held before us in chambers with all parties present on March 24, 1970, plaintiff's attorney stated with regard to the within motions:

> "We will not file an answering brief. * * * We will stand on what we filed." Transcript, March 24, 1970, p. 19.

Plaintiff files no statement pursuant to Rule 56(f), F.R.Civ.P., that affidavits in opposition are for any reason presently unavailable.

A week later at a similar conference held on March 31, plaintiff's counsel, at no time suggesting he wished to answer defendants' motions even as to the fifth cause of action (it had not been briefed in connection with plaintiff's earlier motion for a preliminary injunction), stated:

> "Now, I made an offer, and I should like to explicitly restate what the terms of the offer were. I did not say

that I accepted the fact that there were no factual matters involved in the claim about CBS or the sale of beer or other matters. I said that for the purpose of expediting the trial, I am content to rely upon the facts as they said them. I might dispute those facts, but I have the obligation particularly with respect to what is going on in the stadium in St. Louis with respect to beer sales, but I have read those affidavits, and I am perfectly content if there is an early trial, as your Honor has ordered, not to encumber the record with additional facts, because I find in the facts as stated there ample support for the cause of action we set forth."

Transcript, March 31, 1970, p. 16.

First Claim of Fifth Cause of Action

Defendants motions for summary judgment as to each of these distinct claims are treated separately. As to the first, plaintiff's complaint alleges that the St. Louis Club derives substantial revenues from concession sales in its baseball stadium, a large portion of which are of beer; that the St. Louis Club through a parent corporation is engaged in the production, distribution and sale of beer; that said club has limited the sale of beer in the stadium concession to that produced by the affiliated company and has excluded all other beer companies from selling or attempting to sell beer through concession sales in the stadium—all in violation of the Sherman and Clayton Anti-Trust Acts; that the effect of this violation has been, and will continue to be, to increase the revenues of the beer company and diminish the revenues of said ball club available for player salaries (including that of plaintiff).[4]

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[4] The complaint in this regard alleges in full:

"45. As part of its business of staging baseball games, defendant St. Louis National Baseball Club, Inc. derives substantial revenues from concession sales in its baseball stadium. On information and belief, a substantial portion of such revenues from concession sales are derived from the sale of beer. 46.

Defendant St. Louis Club submits the affidavit of its Vice President and General Manager, Vaughan P. Devine, dated January 29, 1970. He acknowledges that the St. Louis Club is in effect wholly-owned by Anheuser-Busch, Inc., which is engaged in the production, distribution and sale of beer. He states, contrary to plaintiff's allegations, that "the beers sold at the St. Louis ballpark are not limited to beers produced by Anheuser-Busch." Rather, two of the four beers sold at the ballpark are produced by companies in which neither the St. Louis Club nor Anheuser-Busch has any ownership or other interest whatsoever.

Of foremost importance with regard to plaintiff's claim, affiant Devine avers:

> "The right to sell beer within the St. Louis ball park is given to a concessionaire completely independent of Defendant, St. Louis National Baseball Club, Inc. and completely independent of Anheuser-Busch, Incorporated, by a contract between the concessionaire and the owner of the St. Louis ball-park, Civic Center Redevelopment Corporation.
>
> 7. Defendant, St. Louis National Baseball Club, Inc. derives no revenue whatever from any concession sales, including sales of beer, in the St. Louis ball park. Its

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Through a subsidiary, affiliate or parent corporation, defendant St. Louis National Baseball Club, Inc. is also engaged in the production, distribution, and sale of beer. On information and belief, by means of various contracts, agreements, and combinations, defendant St. Louis National Baseball Club, Inc. has limited the sale of beer in the stadium concession sales to the beer produced by the affiliated company, and has excluded all other beer companies from selling or attempting to sell beer through concession sales in the stadium, in violation of §§ 1 and 2 of the Sherman Anti-Trust Act and § 3 of the Clayton Anti-Trust Act (15 U.S.C. §§ 1, 2, and 14). 47. On information and belief the effect of this violation has been, and will continue to be, to increase the revenues of the beer company and diminish the revenues of defendant St. Louis National Baseball Club, Inc. available for player salaries, including that of plaintiff."

> revenues are completely independent of and have no connection with any such concession sales; and no matter what beers are sold in the St. Louis ball park, Defendant, St. Louis National Baseball Club, Inc. does not participate in the revenue."
>
> Affidavit of Vaughan P. Devine, January 29, 1970, ¶¶ 6 and 7.

Plaintiff does not dispute that this affidavit satisfies the evidentiary standards of Rule 56(e), F.R.Civ.P.

As we see it, plaintiff's allegations have been fatally undercut by the sworn statements in this affidavit. And so defendant St. Louis Club is entitled to summary judgment in its favor on this fifth cause of action. See generally, H. Daroff & Sons, Inc. v. Strickland Transportation Co., 284 F.Supp. 510 (E.D.Pa.1968).

[3] Plaintiff seeks only injunctive relief for this alleged federal antitrust violation, presumably pursuant to 15 U.S.C. §26. In order to bring suit as a private party under that section, plaintiff must show not only a violation of the antitrust laws, but also "threatened loss or damage" by virtue of said violation. 15 U.S.C. §26. See United States v. Borden Co., 347 U.S. 514, 518, 74 S.Ct. 703, 98 L.Ed. 903 (1954); Beegle v. Thomson, 138 F.2d 875, 881 (7th Cir. 1943). While plaintiff need not show actual injury suffered, he must "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969). Additionally, it appears that "the injury must be 'direct,' not 'incidental.'" See S.C.M. Corp. v. Radio Corp. of America, 276 F.Supp. 373, 376–378 (S.D.N.Y.1967), aff'd 407 F.2d 166 (2d Cir.), cert. denied 395 U.S. 943, 89 S.Ct. 2014, 23 L.Ed.2d 461 (1969).

[4] Based upon the unrebutted affidavit submitted by defendant St. Louis Club, plaintiff has not suffered and is

not threatened with suffering any injury, direct or incidental, by virtue of any claimed antitrust violation respecting the beers sold in the St. Louis ball park.[5] The concessionaire is wholly independent of the St. Louis Club and of Anheuser-Busch; its contract is with the stadium owner; the St. Louis Club does not participate at all in any revenues derived from concession sales. Thus, there being no genuine issue of material fact between the parties and it appearing that the St. Louis Club's revenues were in no way affected by the beer concession sales, plaintiff lacks standing to maintain this action.[6] Accordingly, we need not consider the further question of whether plaintiff's underlying antitrust claim that all other beer companies have been excluded has been wholly vitiated by defendants' unrebutted averment that the beer of two companies other than Anheuser-Busch is sold at the ball park.

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[5] Plaintiff has not alleged or even suggested that the St. Louis Club agreed with the concessionaire and/or the stadium owner not to seek any share in concession revenue in return for the sale by the concessionaire of Anheuser-Busch beer. In fact, his complaint alleges that the ball club does derive substantial revenue from concession sales. We believe it inappropriate for us to engage in undue speculation as to what claims plaintiff *might* have made which might not be undercut by defendants' present affidavit, since, as we see it, none have been made and as far as we know none fairly could be made. On the state of the record before us there are no triable issues of fact between the parties. Plaintiff in fact appears content to rest his entire case in this regard upon defendants' affidavit.

[6] We believe this is so even under the broadest criteria for standing:

> "there must in addition [to adversary interest] be some connection between the official action challenged and some legally protected interest of the party challenging that action." *Jenkins* v. *McKeithen*, 395 U.S. 411, 423, 89 S.Ct. 1843, 1850, 23 L.Ed.2d 404 (1969).

Second Claim of Fifth Cause of Action

Plaintiff's second claim asserted against the defendant New York Club alleges in full:

> "48. Defendant New York Yankees, Inc, are owned by the Columbia Broadcasting System, one of the three national radio and television networks which might bid on the right to broadcast professional baseball games. On information and belief, as a result of its ownership of the New York Yankees, Inc., the Columbia Broadcasting System has refrained from bidding on such broadcast rights with consequent injury to competition, in violation of §§1 and 2 of the Sherman Anti-Trust Act and §7 of the Clayton Anti-Trust Act (15 U.S.C. §§1, 2, and 19).
>
> 49. The consequence of this violation has been and continues to be, to reduce the revenues of Organized Baseball from the sale of broadcast rights, in which revenues players such as plaintiff would share."

Defendant New York Yankees in opposition submit the affidavit of William C. MacPhail, Vice-President Sports for CBS Television Network, a division of Columbia Broadcasting System, Inc. (CBS), dated January 27, 1970. It seems to us that the heart of plaintiff's claim—that CBS has refrained from bidding on broadcast rights to professional baseball games—is stopped by the unrebutted factual allegations of this affidavit.

Thus, affiant MacPhail avers:

> 2. On October 19, 1965, at the O'Hare Inn in Chicago, Illinois, I appeared before the Major League Baseball Television Committee and presented to such Committee CBS' bid in the amount of $6,000,000 per year for the television and radio broadcasting rights to the World Series and All Star Game for the years 1967 and 1968 and $2,000,000 per year for the national television rights to the Saturday Game of the Week for the years 1966, 1967, and 1968. This bid was not accepted by the Committee. This was the first and only opportunity for CBS to bid for such broadcasting rights after CBS acquired control of New York Yankees Inc.

3. CBS has made no subsequent bids for broadcasting rights to these events inasmuch as I was informed by members of the Committee that the original contract with National Broadcasting Company, the successful bidder, had been extended through the year 1971 pursuant to a first negotiation clause contained in such contract."

Affidavit of William C. MacPhail, January [redacted], 1970.

Again, plaintiff does not dispute that this affidavit satisfies the evidentiary standards of Rule 56(e), F.R.Civ.P.

[5] As we have seen, plaintiff is content to allow the factual allegations contained in defendants' affidavits—which strike at the core of the claim he asserts—to go unrebutted and, thus, admitted for purposes of the motion for summary judgment.[7] Indeed, he expresses his willingness to rest upon them at trial. Accordingly, there being no genuine factual dispute between the parties on the record before us, summary judgment in favor of defendant New York Yankees is appropriate and hereby ordered. We need not consider defendants' further contention that assuming an antitrust violation existed as claimed, nevertheless plaintiff's threatened injury, if any, is incidental and not direct, and, thus, lacking any causal connection between offense and injury, he lacks standing to sue. See generally, S.C.M. Corporation v. Radio Corporation of America, *supra*.

Conclusion

In summary, for the reasons set forth above defendants' motions to dismiss plaintiff's first four causes of action which contest the legality of baseball's reserve system are

[7] Plaintiff having chosen to rest upon his complaint, it is not for the Court to speculate whether plaintiff might have alleged that although CBS did not "refrain" from bidding, its bid was not entered competitively and in good faith. No such claim ever having been made, we believe it only fair to conclude that there is no triable issue of fact raised in that regard.

deferred until the trial; defendants' motion for summary judgment in favor of defendants St. Louis National Baseball Club, Inc. and New York Yankees, Inc. on both claims of plaintiff's fifth cause of action is granted.

This shall be considered an order; settlement thereof is unnecessary.

April 23, 1970.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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70 Civ. 202

CURTIS C. FLOOD, *Plaintiff*

against

BOWIE K. KUHN, Individually and as Commissioner of Baseball, CHARLES S. FEENEY, Individually and as President of the National League of Professional Baseball Clubs, JOSEPH E. CRONIN, Individually and as President of the American League of Professional Baseball Clubs, ATLANTA BRAVES, INC., CHICAGO NATIONAL LEAGUE BALL CLUB, THE CINCINNATI REDS, INC., THE HOUSTON SPORTS ASSOCIATION, LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB LTD., METROPOLITAN BASEBALL CLUB, INC., PHILADELPHIA NATIONAL LEAGUE CLUB, PITTSBURGH ATHLETIC CO., INC., ST. LOUIS NATIONAL BASEBALL CLUB, INC., SAN DIEGO PADRES, SAN FRANCISCO GIANTS' BASEBALL CLUB, BALTIMORE BASEBALL CLUB, INC., BOSTON RED SOX, CLEVELAND INDIANS, INC., DETROIT BASEBALL CLUB, NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., GOLDEN WEST BASEBALL CO., CHICAGO WHITE SOX, KANSAS CITY ROYALS BASEBALL CLUB, MINNESOTA TWINS, INC., OAKLAND ATHLETICS, and PACIFIC NORTHWEST SPORTS, INC.

Defendants.

Opinion

On October 8, 1969, Curtis C. Flood, then a major league professional baseball player for the St. Louis Cardinals, was "traded," his contract transferred and assigned to another National League baseball club, the Philadelphia Phillies, as part of a multi-player transaction between the two

clubs. At the time of the trade he was thirty-two years old, a veteran of twelve years service with the Cardinals, co-captain of the team, and acknowledged to be a player of exceptional and proven baseball ability. Unhappy and disappointed, Flood was unwilling to play for Philadelphia, but forbidden by his contract and the rules of organized professional baseball from negotiating with any other ball club.

He initiated this action on January 16, 1970 against the twenty-four major league clubs comprising the American and National Leagues of organized baseball, their respective Presidents, and against the Commissioner of Baseball asserting in four separate causes of action that baseball's "reserve system" is unlawful.[1] Briefly stated, the reserve system, commonly referred to as the "reserve clause," consists of a number of baseball rules, regulations and uniform contract terms which together operate to bind a player to a ball club and restrict him to negotiating with that club only.

The first of plaintiff's four causes of action alleges that the reserve system constitutes a conspiracy among the defendants to boycott the plaintiff and to prevent him from playing baseball other than for the Philadelphia club in violation of the Sherman and Clayton Anti-Trust Acts. His second and third causes of action are state law claims against eleven of the twenty-four club defendants[2] with jurisdiction based on diversity of citizenship. The second contends that the reserve system and defendants' practices thereunder constitute violations of the antitrust laws of New York, California and the other states where major

[1] A fifth and largely unrelated cause of action against the St. Louis Cardinals and New York Yankees attacked as anti-competitive and in violation of federal anti-trust laws certain alleged relationships between those clubs and other non-baseball enterprises.

[2] No individual is named as a defendant.

league baseball is played and also violate state civil rights statutes, while the third contends that by the reserve system defendants have restrained the plaintiff's "free exercise of playing professional baseball in New York, California, and the several states in which defendants stage baseball games, in violation of the common law." His fourth cause of action, directed against thirteen club defendants and alleging federal question and civil rights jurisdiction under 28 U.S.C. §§1331 and 1343, asserts that the reserve system is a form of peonage and involuntary servitude in violation of the anti-peonage statutes, 42 U.S.C. §1994 and 18 U.S.C. §1581, and the Thirteenth Amendment and that it deprives him of "freedom of labor" in violation of the Norris La-Guardia Act, 29 U.S.C. §§102-103.

By way of relief plaintiff seeks a declaration of the illegality of baseball's reserve system, an injunction restraining defendants from agreeing among themselves to refuse him employment, and certain damages allegedly sustained since December 30, 1969 as a result of defendants' refusal to bargain with him as a free agent.

Following the filing of his complaint, plaintiff moved before this Court on February 3, 1970 for a preliminary injunction declaring him a free agent, or, as we viewed it alternatively, permitting him to remain as a player for St. Louis pending a final determination of the merits. On March 4, 1970 we denied this application for an injunction *pendente lite* on the grounds that it would disturb the status quo; that the balance of hardship did not tip decidedly in plaintiff's favor; and that there was insufficient showing of probable eventual success on the merits of any of his four causes of action. *Flood* v. *Kuhn*, 309 F.Supp. 793 (S.D.N.Y. 1970).

On March 24, 1970 we granted plaintiff's application for an early trial. On April 23, 1970 we deferred action, pursuant to Rule 12(d), F.R.Civ.P., on defendants' motions to dismiss the first four causes of action, but granted sum-

mary judgment dismissing the unrelated fifth cause of action above-mentioned against the St. Louis Cardinals and New York Yankees. *Flood* v. *Kuhn*, ... F.Supp. ..... (S.D.N.Y. 1970).

The remaining four causes of action contesting the legality of baseball's reserve system were tried to this Court from May 19 to June 10, 1970. The trial record consists of some 2000 pages of transcript and 56 exhibits. At the close of trial we reserved decision and fixed July 13, 1970 as the date for all post-trial memoranda.

We resolved to allow great liberality in the making of the total trial record to the end that each theory or contention advanced by the litigants would be amply covered and dealt with when all the proof was in.

Baseball and the Reserve System

Baseball is our national pastime and has been so for well over a century. Most of our interest in the sport as fans and spectators centers around professional or organized baseball. Organized baseball consists of the twenty-four major league teams which comprise the American and National Leagues and the various tiers of minor leagues which serve principally as training grounds for aspiring players. Tr. 645-46.[3] There exist no competitive professional teams in North America outside this structure. *Id.* All are governed by either the Major League Rules or the corresponding Professional Baseball Rules (applicable to the minor leagues) and are subject to the broad powers of the Commissioner of Baseball. Tr. 647-52; Major League Agreement, Articles I, IV, VII, IX.

At the center of this single, unified but stratified organization of baseball leagues is the reserve system, the essence of which has been in force for nearly one hundred years, almost the entire history of organized professional baseball.

[3] "Tr." followed by a number refers to pages of the trial transcript herein.

All teams in organized baseball agree to be bound by and enforce its strictures. It is perhaps the cornerstone of the present structure in that it insures team continuity and control of a supply of ballplayers. It is the heart of plaintiff's complaint.

From the standpoint of the professional baseball player, its effect is to deny him throughout his career freedom to choose his employer. Since 1965 each new player seeking to enter baseball has been exposed to a draft by the major and minor league clubs. See Major League Rule 4. If selected by a club in this semi-annual draft, he may bargain only with that club; should he wish not to play for that club he must wait until the next draft is held. *Id.*

Regardless of whether his entry into organized baseball is through the player draft or as a free agent, he must sign a Uniform Player's Contract, the only form of contract permitted between player and club, which empowers the signing club unilaterally to renew his contract continuously from year to year should he and the club fail to come to terms on a new agreement.[4] Once signed he is thereafter

[4] Rule 3(a) of the Major League Rules and Professional Baseball Rules agreed to by all professional baseball clubs requires that each club contract with its players only pursuant to the Uniform Player Contract prescribed by the Major League Executive Council and specifically that "no club shall make a contract . . . containing a non-reserve clause." Further, "[t]he making of any agreement between a club and a player not embodied in the contract shall subject both parties to discipline; and no such agreement, whether written or verbal, shall be recognized or enforced." The renewal clause is contained in paragraph 10(a) of the Uniform Player Contract and provides that if in the year of expiration of the contract a player and club do not reach agreement on a new contract by a certain date "the Club shall have the right by written notice to the Player at [his] address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice . . . at a rate not less than 80% of the rate stipulated for the preceding year." Any contract so renewed would itself contain this renewal clause.

forbidden to negotiate toward prospective baseball employment with any club other than the one to whom he is under contract.[5] Thus, the club has a right to his services for as long as it wishes to renew his contract, subject only to his right to retire from baseball. The total number of ballplayers so controlled is limited by the provision that no major league club may have over forty active players under contract and on its reserve list.[6]

---

[5] Rule 3(g) of the Major League and Professional Baseball Rules provides:

> "(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved; or which has the player on its Negotiation List; . . . unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement."

[6] The reserve rule, Major League Rule 4–A, provides in part:

> "On or before November 15 in each year, each Major League Club shall transmit to the Commissioner and to its League President a list of not exceeding forty (40) active and eligible players, whom the club desires to reserve for the ensuing season; and also a list of all its players who have been promulgated as placed on the Military, Voluntarily Retired, Restricted, Disqualified, Suspended or Ineligible Lists; and such players signed under Rule 4 who do not count in the club's under control limit. . . . [N]o player on any list shall be eligible to play for or negotiate with any club until his contract has been assigned or he has been released."

Of the forty active players on a club's reserve list, fifteen are generally minor league players since a major league team may have a maximum of twenty-five players on its active roster. Major League Rule 2. There are more players in the minor leagues than these remaining fifteen players reserved by each major league club. These minor league players who are not reserved by a major league club may in turn be reserved by their minor league club. Professional Baseball Rules 2 and 4–A. Such players are also subject an an annual draft by all the major league clubs. Rule 5 of the Major League and Professional Baseball Rules.

If it chooses, a club may assign a player's contract to another club without consulting the player or obtaining his consent.[7] Should his contract be assigned his new club becomes heir to all of the above-mentioned rights and obligations vis-a-vis the player.[8] If a player refuses to sign his contract and play, as Flood has, he is placed on a Restricted List whereby the club last holding his contract, in this case Philadelphia,[9] retains the exclusive right to negotiate with the player.[10] Only if released does a player become a free agent; he cannot achieve such status by his own choosing.[11]

Plaintiff's witnesses in the main concede that some form of reserve on players is a necessary element of the organization of baseball as a league sport, but contend that the present all-embracing system is needlessly restrictive and offer various alternatives which in their view might loosen

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[7] Rule 9 of the Major League and Professional Baseball Rules provides in part:

> "A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment is by his contract [paragraph 6(a) of the Uniform Player Contract] bound to serve the assignee."

[8] Rule 9 of the Major League and Professional Baseball Rules further provides in part:

> "After the date of such assignment all rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club except as otherwise provided in Rule 4. . . ."

[9] By virtue of the assignment of Flood's contract by St. Louis to Philadelphia and the exercise by Philadelphia of its option to renew.

[10] Rule 15, Major League and Professional Baseball Rules.

[11] Before a player may be unconditionally released and his contract terminated he must be placed on waivers making his contract available to every other major league club. Major League Rule 8. See also, Uniform Player Contract, paragraph 7.

the bonds without sacrifice to the game.[12] Plaintiff points to the present experience of other professional sports such as football, basketball and hockey, each of which survives relatively comfortably with a reserve system or organizational structure whose elements to a varying extent offer more freedom of choice and flexibility to its players. Tr. 448-590 (see especially: football, Tr. 463, 466-67, 480, 490; basketball, Tr. 520-23; hockey, Tr. 552-53, 559-60, 569, 572, 577, 582-84, 587); Plaintiff's Exhibits 12, 13, 14, 16, 17, 18, 19 and 20 in evidence.

The defendant clubs and Commissioner of Baseball, on the other hand, contend that the restrictions of the present system are reasonable and necessary to preserve the integrity of the game, maintain balanced competition and fan interest, and encourage continued investment in player development; that none of the alternatives suggested by plaintiff would be workable and still satisfy all three of these criteria; and that, upon comparison, baseball with its player safeguards [13] is hardly more restrictive in its reserve system

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[12] Modifications of and alternatives to the present reserve system suggested by plaintiff include: (a) independent competitive leagues; (b) limitation of club control over a player to a fixed term of years; (c) permitting a player to become a free agent after an option period; (d) trade veto for veteran players; (e) minimum salary progression; (f) reduction in the number of reserved players; (g) salary arbitration. Consideration was given them both individually and in combination. Various refinements were advanced to meet certain objections raised as to proposals (b) and (c), including a right of first refusal given to the player's club to match any offer obtained by the player, a restriction of negotiations to only clubs in the other league and then only in the off-season, and/or a more equalized division of baseball revenues among clubs. See Tr. 221–22, 235, 237–38, 247, 255–58, 1966–67, 1981–84, 1985–86, 2020–23.

[13] Defendants include the following safeguards of fair treatment: (a) the forty player reserve limit (Major League Rule 4-A); (b) the waiver rules (Major League Rule 10); (c) the minor league draft (Major League Rule 5); (d) the maximum permissible salary cut provision (Uniform Player Contract, para. 10); (e) termina-

than are the other professional sports. See Tr. 652-913, 932-1121, 1232-1545. Defendants point to the instability in the early history of baseball and before institution of the reserve system as evidence of the danger to be anticipated from any modification of its substance. See Plaintiff's Exhibit 15-A in evidence (the Celler Report entitled "Organized Baseball," Subcommittee on the Study of Monopoly Power of the Committee of the Judiciary of the House of Representatives, 82nd Cong., 2d Sess. (1952)).

THE RESERVE SYSTEM—A NECESSITY?

Prior to trial we gained the impression that there was a view, held by many, that baseball's reserve system had occasioned rampant abuse and that it should be abolished. We were struck by the fact, however, that the testimony at trial failed to support that criticism; we find no general or widespread disregard of the extremely important position the player occupies. Cf. note 16, *infra*.

Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself,[14] it shows that even plaintiff's witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious. It lends support to our view, expressed at another point in this opinion, that arbitration or negotiation would extract such troublesome fault as may exist in the present system and,

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tion pay (Uniform Player Contract, para. 7); (f) the requirement of consent before assigning a veteran to the minor leagues (Major League Rule 9 (g)); (g) the minimum salary provision (Uniform Player Contract); (h) Major League Baseball Players Benefit Plan.

[14] Flood stated near the close of his testimony, "I would like the whole system to be struck down and declared illegal," adopting as his view the proposition that "no provision in that system . . . is beneficial either to the players or to organized baseball." Tr. 118 and 121.

preserving its necessary features, fashion the reserve clause so as to satisfy all parties.

Thus, former baseball star Jack (Jackie) Robinson responded to questioning in this regard as follows:

> "Q. Do I understand, however you interpret the expression 'reserve clause' or 'reserve system,' that your testimony is that you favor modifications of that system? Is that right?
>
> A. [Robinson] That is correct, I do.
>
> Q. You don't favor destruction of the system, do you?
>
> A. No, Sir." Tr. 217. See Tr. 218-19. See also Tr. 198, 216.

Witness Henry (Hank) Greenberg, also a former star player, was of the opinion:

> "I think the players themselves, having functioned under the reserve system all these years, recognize the fact that the club has some equity in the players' services. . . ." Tr. 247. See also, Tr. 236, 248.

And former club owner William Veeck declared:

> "Well, the complete elimination of the reserve system or the reserve clause in contracts I think would not be helpful to baseball. I am afraid that if you suddenly terminated and there was no control of contracts by any club, that it could—and I say only could—result in some rather chaotic conditions. I feel, however, that this would not be the case if it were done in an orderly manner.
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> * * * * * * * * * * * *
>
> I feel that there should be some kind of a contractual relationship extending over a period of years. . . . I don't mean it should stop and there should be nothing in its place." Tr. 1965, 1966.

The Federal Antitrust Claim

The Supreme Court held in 1922 that professional baseball was not within the scope of the federal antitrust laws

because the exhibitions were purely state affairs to which the interstate transportation of players was merely incidental and were not trade or commerce in the ordinarily accepted use of the words. *Federal Baseball Club of Baltimore, Inc.* v. *National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

When this question again reached the Supreme Court in 1953, intervening decisions appeared to have vitiated any holding that baseball was not subject to the antitrust laws because its activities either did not sufficiently affect or were not interstate commerce. See *Gardella* v. *Chandler*, 172 F.2d 402 (2d Cir. 1949). Without reexamining this underlying issue of interstate commerce, however, the Supreme Court reaffirmed its prior decision in *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953). The reasons assigned for the conclusion were that baseball had developed for thirty years in reliance on its "understanding that it was not subject to existing antitrust legislation;" that Congress had not seen fit to bring baseball under the antitrust laws "by legislation having prospective effect;" that the existing legislation should not be held applicable with "retrospective effect;" and that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."

Subsequent decisions established that *Toolson* "was a narrow application of the rule of *stare decisis*" applicable only to baseball and to no other industry or professional sport. *Radovich* v. *National Football League*, 352 U.S. 445 (1957); *United States* v. *International Boxing Club*, 348 U.S. 236 (1955); *United States* v. *Shubert*, 348 U.S. 222 (1955). Specifically, four years after *Toolson*, the Supreme Court held the antitrust laws applicable to professional football and its reserve system, while continuing to distin-

guish baseball as the only sport encompassed within its prior contrary determination in *Federal Baseball*. See *Radovich* v. *National Football League, supra*.

In brief, plaintiff asserts the following in support of his contention that these decisions do not bar this Court from anticipating their demise and granting him relief:

> "Changes in baseball since 1922, or even since 1953, have thrust the game squarely within contemporary concepts of interstate commerce. And the reliance interests of the team owners, when properly analyzed in light of the liberalized doctrine allowing prospective relief and the plaintiff's request for only such relief, presents no barrier. Finally, the silence of Congress since 1953 argues for, rather than against, a judicial reexamination of the discretionary judgment exercised in *Toolson*." Plaintiff's Post-Trial Brief, July 7, 1970, p. 47.

In our decision of March 4, 1970 denying plaintiff a preliminary injunction, we considered in some depth these and certain other arguments made by plaintiff and concluded that "several weighty factors compel the conclusion that the overruling of *Toolson* is by no means the probable result of this litigation." *Flood* v. *Kuhn*, 309 F.Supp. 793, 801-05 (S.D.N.Y. 1970). In general, we based this conclusion on the fact that *Toolson* held Congress had no intention to bring baseball within the antitrust laws, and did not rest on any presumed absence of interstate commerce; that prospective relief of the nature envisaged by plaintiff would be unprecedented; that, in any event, such court-imposed relief might still have a serious retrospective effect on the reliance interests of baseball; that the continued silence of Congress may take on aspects of ratification in light of the importance attached thereto in these decisions of the Supreme Court; and, finally, that "decisions of the Supreme Court are not lightly overruled, particularly those which have a history as long as this one . . . whatever may be our view of the rightness of plaintiff's

claim. . . ." We find the trial before us amplifies those expressed views.

Subsequent to our determination of the motion for a preliminary injunction and to the trial of the issues herein, we were supported in these same views by the recent decision of our Circuit in *Salerno and Valentine* v. *American League of Professional Baseball Clubs et al.*, ... F.2d ..... (2d Cir., slip opinion, July 13, 1970). *Salerno* is unquestionably conclusive, at least at this level, of the Federal antitrust issues herein. The panel in an opinion by Judge Friendly unanimously held:

> "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' *Radovich* v. *National Football League*, 352 U.S. 445, 452 (1957). We add that *Boys Mkts., Inc.* v. *Retail Clerk's Local 770*, 38 L.W. 4462, decided June 1, 1970, overruling *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), despite Congress' failure to act on invitations to do so, may presage a change from the attitude with respect to such inaction that was expressed in *Toolson*, 346 U.S. at 357, which Mr. Justice Black in dissent invoked to no avail, 38 L.W. at 4469. However, putting aside instances where factual premises have all but vanished and a different principle might thus obtain, we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not all all certain the Court is ready to give them a happy despatch."

Salerno mandates that plaintiff's federal antirust claims be denied. Since baseball remains exempt from the antitrust laws unless and until the Supreme Court or Congress holds

to the contrary, we have no basis for proceeding to the underlying question of whether baseball's reserve system would or would not be deemed reasonable if it were in fact subject to antitrust regulation.

Labor Antitrust Exemption

Despite our firm belief (as hereinafter advanced) that these issues can and should be resolved by negotiations between the players and the club owners, we remain in doubt as to whether this matter stands exempt from the antitrust laws because it is a mandatory subject of collective bargaining. Defendants contend that a consistent application of *Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965) admits of no other result. Plaintiff submits that defendants misread *Jewel Tea;* that "benefits to organized labor cannot be utilized as a cat's paw to pull employers' chestnuts out of the antitrust fires;" and that *United States* v. *Women's Sportswear Mfr's Ass'n*, 336 U.S. 460, 464 (1949) requires rejection of an antitrust immunity for this reserve system created and imposed by the club owners long before the arrival of collective bargaining.

We need not reach this difficult question in light of our disposition that the Supreme Court alone is privileged to overrule *Toolson* and hold baseball subject to the antitrust laws.

State Law Claims

Plaintiff next asserts in two separate causes of action that the reserve system violates state law, both statutory and common. He argues that defendants cannot have it both ways: that if the federal antitrust laws do not reach baseball then state antitrust, civil rights and labor statutes and common law are applicable. We disagree.

Plaintiff would surely be correct if *Toolson* were no more than a reaffirmation of *Federal Baseball* based on a supposed absence of interstate commerce. However, *Toolson* cannot be so read. As our Circuit recently held, "the ground

upon which *Toolson* rested was that Congress had no intention to bring baseball within the antitrust laws, not that baseball's activities did not sufficiently affect interstate commerce." *Salerno and Valentine* v. *American League of Professional Baseball Clubs et al., supra.*

As interstate commerce, baseball is subject to regulation by Congress. Cf. *American League and Ass'n of Umpires,* 180 N.L.R.B. No. 30, Case 1-RC-10414 (December 15, 1969). It has been held exempt from existing antitrust legislation covering other related and integrated activities. It is not for this Court to write off *Toolson* as a anomaly. Its rationale must be given effect. We believe it unlikely that the Supreme Court would have held, as it did, that baseball's reliance interests precluded overruling *Federal Baseball* and that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws," if it considered baseball vulnerable to state regulation. Enforcement of such state laws would appear to produce a result inconsistent with the objective of the federal antitrust laws interpreted by the Supreme Court as excluding the business of baseball.

Thus, we agree with the reasoning expressed by certain of the majority of the Supreme Court of Wisconsin in holding its state antitrust laws could not be applied to prevent transfer of a baseball club franchise:

> "The [United States Supreme] court has also said that while various tests may be used for guidance as to the regulatory power left to the states where Congress is silent, the ultimate question is whether the state action conflicts with national policy. . . .
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> * * * * * * * * * *
>
> The situation which confronts us is not one where Congress has been silent as to a particular type of regulation in a broad field of interstate commerce, where the proposition may readily be implied that although no need has been found for federal regulation, state regulation of local aspects may be quite appro-

priate. Rather, here, Congress has remained silent as to regulation of a particular industry, either by imposition of antitrust laws or otherwise, in the face of and seemingly in response to a series of judicial decisions which uniquely and emphatically pose the question to Congress of whether there shall be regulation in antitrust terms or otherwise.

* * * * * * * * * *

It is plausibly argued that silence of Congress in this context demonstrates congressional recognition that league structure and the related agreements and rules are integral parts of professional baseball as it exists, and that the application of the familiar type of antitrust legislation to the structural arrangements of organized baseball is inappropriate; . . . that there is to be self regulation until such time as Congress decides that the public interest requires other control.

* * * * * * * * * *

. . . We deem it unrealistic to interpret these decisions of the supreme court of the United States plus the silence of Congress as creating a mere vacuum in national policy, leaving the states free to regulate the membership of the baseball leagues." *State* v. *Milwaukee Braves, Inc.*, 144 N.W. 2d 1, 16-18, *cert. denied*, 385 U.S. 990 (1966). See also, *id.* at n.17.

Although transfer of a team franchise is certainly distinguishable (particularly with regard to the likelihood of state discrimination in favor of its own economic interests) from restraints imposed by the reserve system upon players' freedom to negotiate, the reasoning of *Milwaukee Braves* is still persuasive here. The reserve system, which was the subject of Toolson's complaint, certainly falls squarely within the scope of baseball's federal antitrust exemption and, thus, within the area preempted from state regulation.

Even if the Supreme Court decisions and the silence of Congress fail to establish or indicate a national policy regarding baseball sufficiently certain to rise to the level of federal preemption, nevertheless we believe the nation-

wide character of organized baseball combined with the necessary interpedence of the teams requires that there be uniformity in any regulation of baseball and its reserve system. In *Milwaukee Braves* the other members of the majority preferred the view, at least as to matters such as league structure, that "since organized baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress." *Id* at 18.

We do not believe that the operation of baseball and its reserve system is a matter which admits of diversity of treatment. State and local laws may not unduly burden interstate commerce.

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. . . .
>
> But ever since *Gibbons* v. *Ogden*, . . . the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority. . . . Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself . . . or upon the presumed intention of Congress, where Congress has not spoken . . . the result is the same." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767-68 (1945).

As we see it, application of various and diverse state laws here would seriously interfere with league play and the operation of organized baseball. Cf. *American League and Ass'n of Umpires, supra.*

Accordingly, plaintiff's state law claims, common law and statutory alike, must be denied. Just as we found it unnecessary to determine whether plaintiff's federal anti-

trust claims were barred by the labor antitrust exemption, so too, here, we need not resolve whether *Teamsters Union* v. *Oliver*, 358 U.S. 283, 296 (1959) applies and whether the federal labor law scheme leaves no room for the application of state antitrust policy to baseball's reserve system.

Involuntary Servitude Claim

Plaintiff's fourth cause of action asserts that the reserve system violates the Thirteenth Amendment and its enforcing legislation which similarly prohibits holding any person to "involuntary servitude," 18 U.S.C. §1584.[15] Although neither expressly provides for a civil remedy, jurisdiction to grant relief for a violation of such provision may be found in 28 U.S.C. §§1331 and 1343. See *Reitmeister* v. *Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947); *Bryant* v. Donnell, 239 F.Supp. 681, 683 (W.D. Tenn. 1965). See also, *Bell* v. *Hood*, 327 U.S. 678 (1946).

Plaintiff acknowledges that this claim presents a case of first impression. He relies principally on a 1914 decision of a New York Supreme Court, *American League Baseball Club* v. *Chase*, 86 Misc. 441, 465, 149 N.Y.S. 6, 19 (1914), which is quoted from at some length by Judge Frank in *Gardella* v. *Chandler*, 172 F.2d 402, 409-10 (2d Cir. 1949). However, Judge Frank Recognized that terming the reserve system "peonage" was "perhaps a bit exaggerated" and concluded that "I am not to be understood as implying that [it] violates[s] the Thirteenth Amendment or the statutes enacted pursuant thereto." *Gardella* v. *Chandler*, *supra* at 410.

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[15] Plaintiff's post-trial brief argues only that the reserve system creates a system of involuntary servitude. Apparently, he no longer contends either that such a system creates a condition of peonage, 18 U.S.C. §1581 and 42 U.S.C. §1994, or that it violates the public policy declared in the Norris LaGuardia Act, 29 U.S.C. §§102–193. We have considered such sections nevertheless and have concluded that they have no application here.

In *Pollack* v. *Williams*, 322 U.S. 4, 17 (1944), the Supreme Court, reviewing a state statute authorizing criminal sanctions against any person who fails to perform a personal service contract on which he has obtained an advance, stated that the "undoubted aim of the Thirteenth Amendment . . . was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States." Following that general proposition, the Supreme Court in *Pollock* specified its holding with respect to peonage and the Thirteenth Amendment:

> "Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsary service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor." *Id.* at 18

Similarly, with regard to involuntary servitude and the Thirteenth Amendment, the Supreme Court in *Hodges* v. *United States*, 203 U.S. 1, 16 (1906) stated:

> "The things denounced are slavery and involuntary servitude. . . . All understand by these terms a condition of enforced compulsory service of one to another."

Our Circuit has held that threats of deportation in order to retain an employee's services do not constitute holding to involuntary servitude within the proscription of 18 U.S.C. §1584, the statute relied on by plaintiff. See *United States* v. *Shacknev*, 333 F.2d 475 (2d Cir. 1964). The court sought to avoid bringing the criminal law into play "whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful." *Id.* at 487. Involuntary servitude is defined therein as follows:

> "But a holding in involuntary servitude means to us action by the master causing the servant to have, or to

believe he has, no way to avoid continued service or confinement. . . ." *Id.* at 486.

A showing of compulsion is thus prerequisite to proof of involuntary servitude. Concededly, plaintiff is not compelled by law or statute to play baseball for Philadelphia. We recognize that, under the existing rules of baseball, by refusing to report to Philadelphia plaintiff is by his own act foreclosing himself from continuing a professional baseball career, a consequence to be deplored. Nevertheless, he has the right to retire and to embark upon a different enterprise outside organized basball. The financial loss he might thus sustain may affect his choice, but does not leave him with "no way to avoid continued service. . . ." *Id.* Therefore, as stated in *Wicks v. Southern Pacific Co.*, 231 F.2d 130, 138 (9th Cir. 1956):

> "There is no contention that appellants cannot freely leave their employment with the railroads. . . . While leaving their present employment would entail serious loss in terms of seniority rights, medical benefits and retirement benefits, the fact remains that appellants are not being compelled or coerced to work against their will for the benefit of another."

Accordingly, we find that plaintiff has not satisfied the essential element of this cause of action, a showing of compulsory service.

The Conflicts Are Reconcilable

Before concluding this opinion, we wish to unburden ourselves of two strong and related convictions which we took away from this trial. First, despite the opposing positions of plaintiff and the Major League Baseball Players' Association on the one hand, the present management and club owners of organized baseball on the other, we found the witnesses appearing on behalf of both sides in the main credible and of high order; they have a genuine enthusiasm

for baseball and with constancy have the best interests of the game at heart.[16]

Second, we are convinced that the conflicts between the parties are not irreconcilable and that negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned—in essence, what is called for here is continuity with change.

This issue is not so unique or complex and the parties are not at such loggerheads that negotiations could not succeed. What we have already said under "The Reserve System, A Necessity," effectively supports this conclusion. Trial testimony developed several proposed modifications that could serve as bases from which negotiations might proceed toward an accommodation of the valid interests of both sides. See note 12, *supra*.

Plaintiff's witnesses expressed a belief that this matter was capable of being resolved by good faith bargaining between the parties. Thus, Mr. Miller, executive director of the Major League Baseball Players' Association, recited the various modifications suggested by the players and de-

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[16] This is true no less of the club owners than of the players. Hall of Fame immortal Greenberg who participated in baseball first as a player and then as an owner-manager stated, "[the public] has the idea that the owners are just people primarily interested in profits, no concern for the players, which is not true." Tr. 237. We found the testimony of Mr. Kauffman, owner of the Kansas City Royals, fairly reflective of club owners who appeared before us:

> "My number one reason for buying a baseball club was to help Kansas City retain it, and this was an opportunity for me to return to my community some of the benefits which I had reaped.
>
> No. 2 would be the pleasure involved in being a major league owner.
>
> No. 3 would be the prestige, and I presume this is approximate.
>
> And No. 4 would be because I felt I could make it profitable over a period of time . . . ." Tr. 1522.

clared a continuing desire to resolve this dispute. Tr. 1901. He summed up the Association's bargaining position at the various meetings held with management regarding the reserve system as follows:

> "Basically . . . it was our position that the reserve rule system was illegal in that its restrictions were just about total, that it was inconceivable to us that you could have a game of baseball with no rules, but that it seemed quite reasonable to us that modifications which were less restrictive than the present system could be made, were practical, and presumably could make the system safe from an atack in terms of its illegality." Tr. 1904.[17]

The Major League Baseball Players' Association, organized in 1954, has proved a particularly effective bargaining representative obtaining since 1966 highly significant benefits for the players in such areas as pensions, life and disability insurance, health care, minimum salary, arbitration

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[17] Further, Mr. Greenberg testified on plaintiff's behalf:

> ". . . I think that the players recognize that the club should have some hold on them and I feel that it should be very simple to negotiate a term or a period of time in which the player is signed to a club and he has no rights to leave until that period has expired.
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> • • • •
>
> . . . I think it can be done in many, many ways and the game would continue to function and operate and the players would be probably more satisfied and I think it would be best for all interests concerned." Tr. 247, 248.

In this same vein, Mr. Veeck, a former club owner long associated with baseball called by plaintiff as a rebuttal witness, asserted:

> ". . . I don't believe that most athletes want anything but a change, a small change, a step in a direction. . . ." Tr. 1976

Finally, cross-examination of plaintiff elicited:

> "Q. And if Mr. Miller succeeded in inducing the clubs to modify the reserve clause, would you drop this lawsuit?
> A [Flood] Yes, I would."
> Tr. 116.

of grievances, expense allowances, maximum permissible salary cut, termination pay, representation at individual salary negotiations, negotiation of rule changes affecting player benefits or obligations, due process in player discipline. See Defendants' Feeney exhibits F, M and N in evidence. Both management and the Players' Association recognize the reserve system to be a mandatory subject of collective bargaining. The National Labor Relations Board asserted jurisdiction over organized baseball in December, 1969.

The history of negotiations to date does not appear to us to establish, as plaintiff appears to contend, that organized baseball refuses to bargain with regard to the reserve system and will accept no modification of its structure unless forced to do so by the courts or by Congress. In the first place, several of the benefits mentioned above are directed at alleviating some of the undesirable side effects of the reserve system. Morover, serious negotiations aimed at the core of this system are of quite recent origin and the failure to reach a quick accord should not be seen, in our opinion, as indicating intransigence on either or both sides.

While it is true the owners have continued to support the status quo of the reserve system and have been critical of the various proposals by the Players' Association for its elimination or modification, they have not closed the door entirely on various suggestions made during negotiations in the immediate past in efforts to ameliorate the objectionable features of the reserve clause. Indeed, Commissioner Kuhn in his testimony at this trial indicated that, "changes that could be made are changes that are best bargained out between parties that are involved here. . ." And representatives of the club owners expressed substantially similar views.[18]

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[18] In August, 1967 the Players' Association included within its Statement of Policy, containing various proposals for discussion with the club owners, a passage broadly stating that the reserve system is of doubtful legality and calling for a reasoned, open-minded

In such matters as labor relations and family disputes, to name just two, Congress (in the case of collective bargaining) and the courts have determined that such disputes

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approach toward some accommodation. Defendants' Feeney Exhibit O, pp. 5-6. The first Basic Agreement between the clubs and the Players' Association executed on February 19, 1963 provided for a joint study of the reserve system during the two year term of the agreement. Defendants' Feeney exhibit F, Article VIII. At least four meetings were held at which ideas were discussed but no specific proposals made. Tr. 1593-94, 1918. No joint report issued, but the Players' Association prepared a written critique of the reserve system on June 27, 1969. Defendants' Feeney Exhibit Q in evidence.

On August 29, 1969, the Players' Association submitted proposals for various changes in the Basic Agreement. With respect to the reserve system, its very general proposal sought only "alternative provisions" which would be legal, reasonable, and responsive to the legitimate interests of players and club owners. Defendants' Feeney Exhibit P, pp. 1-2. On October 31, 1969, the Players' Association made, apparently for the first time, a specific proposal in the nature of a binding offer for change in the reserve system. Defendants' Feeney Exhibit R in evidence. This proposal for free agency status for players every three years with the original club retaining a right of first refusal was rejected by the clubs in December, 1969. Tr. 1607. Thereafter, other modifications suggested by the players including the National Football League option clause were discussed. The club owners continued to take a bargaining position in support of the status quo. Discussions continued on all aspects of the new agreement including the reserve system until February 19, 1970 when the Players Association and the clubs, with the final termination date of the old agreement drawing near, stipulated that neither party would be required to bargain on the reserve system until the instant lawsuit is finally adjudicated or discontinued. Defendants' Feeney Exhibit N, Attachment B, in evidence. This is the posture in which matters still stand.

While defendants continued to support the status quo and to criticize the modifications suggested by plaintiff at trial, they also reflected a readiness to continue to negotiate toward an accommodation. Commissioner Kuhn testified:

> "Obviously the changes that could be made are changes that are best bargained out between parties that are in-

as do arise therein are best resolved by the parties without outside interference and that resort to a court-imposed solution should be a matter of last resort. This is almost invariably the case whenever two parties must continue to work together amicably toward a common end after the dispute is settled. This is not to hold that the court should adopt a similar hands-off approach toward this case. Nevertheless, we believe that here, as well, the parties themselves are best able to reach a satisfactory accord, and

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volved here, such as the clubs and the players. . . . There have been many changes in the working of the waiver rule, changes in the workings of the option provision, changes in the workings of the minimum salary provisions and so forth.

The reserve system has been an evolving system, and I expect it to continue to be an evolving system." Tr. 806.

Mr. Feeney, President of the National League, affirmed the following:

"Q Now, Mr. Greenberg testified that, 'the reason for my being here, Judge, is that I think this has to be worked out between the owners and the players.'

Wouldn't you agree with Mr. Greenberg on that point?

A [Feeney] Yes, I would." Tr. 985.

American League President Joseph Cronin noted:

". . . one of the things [the late owner of the Washington Senators] taught me was to always keep negotiations going. . . . Never say take it or leave it. Always say 'might consider,' and that is the practice I have maintained throughout my years in baseball." Tr. 1192.

Mr. Gaherin, chief negotiator for the club owners, responded affirmatively when asked if "the clubs recognize that the reserve system is a mandatory subject of bargaining upon which the clubs are legally obligated to bargain with the [Players'] Association." Tr. 1579. Further on he opined:

". . . We certainly have all of the ability in the two sides to sit down and in free area of collective bargaining resolve a matter of this nature.

And I may say parenthetically, if I may, Judge, we are quite willing to do so." Tr. 1616.

Final Judgement

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

The issues in the above entitled action having been brought on regularly for trial before the Honorable Irving Ben Cooper, United States District Judge, on May 19, 21, 22, 25, 26, 27, 28, and June 1, 2, 3, 4, 5, 8 and 9, 1970, and at the conclusion of the evidence, the Court reserved decision, and the Court thereafter on August 12, 1970, having handed down its opinion constituting its findings of fact and conclusions of law in favor of the defendants, and directing the Clerk to enter judgment, it is

ORDERED, ADJUDGED and DECREED: That defendants Bowie K. Kuhn, Individually and as Commissioner of Baseball, Charles S. Feeney, Individually and as President of the National League of Professional Baseball Clubs, Joseph E. Cronin, Individually and as President of the American League of Professional Baseball Clubs, Atlanta Braves, Inc., Chicago National League Ball Club, The Cincinnati Reds, Inc., The Houston Sports Association, Los Angeles Dodgers, Inc., Montreal Baseball Club Ltd., Metropolitan Baseball Club, Inc., Philadelphia National League Club, Pittsburgh Athletic Co., Inc., St. Louis National Baseball Club, Inc., San Diego Padres, San Francisco Giants' Baseball Club, Baltimore Baseball Club, Inc., Boston Red Sox, Cleveland Indians, Inc., Detroit Baseball Club, New York Yankees, Inc., The Washington Senators, Inc., Golden West Baseball Co., Chicago White Sox, Kansas City Royals Baseball Club, Minnesota Twins, Inc., Oakland Athletics, and Pacific Northwest Sports, Inc., have judgment against the Plaintiff Curtis C. Flood dismissing the complaint.

Dated: New York, N.Y.
August 13, 1970

JOHN LIVINGSTON
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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70 Civ. 202

CURTIS C. FLOOD, *Plaintiff*,

– against –

BOWIE K. KUHN, Individually and as Commissioner of Baseball, CHARLES S. FEENEY, Individually and as President of the National League of Professional Baseball Clubs, JOSEPH E. CRONIN, Individually and as President of the American League of Professional Baseball Clubs, ATLANTA BRAVES, INC., CHICAGO NATIONAL LEAGUE BALL CLUB, THE CINCINNATI REDS, INC., THE HOUSTON SPORTS ASSOCIATION, LOS ANGELES DODGERS, INC., MONTREAL BASEBALL CLUB LTD., METROPOLITAN BASEBALL CLUB, INC., PHILADELPHIA NATIONAL LEAGUE CLUB, PITTSBURGH ATHLETIC CO., INC., ST. LOUIS NATIONAL BASEBALL CLUB, INC., SAN DIEGO PADRES, SAN FRANCISCO GIANTS' BASEBALL CLUB, BALTIMORE BASEBALL CLUB, INC., BOSTON RED SOX, CLEVELAND INDIANS, INC., DETROIT BASEBALL CLUB, NEW YORK YANKEES, INC., THE WASHINGTON SENATORS, INC., GOLDEN WEST BASEBALL CO., CHICAGO WHITE SOX, KANSAS CITY ROYALS BASEBALL CLUB, MINNESOTA TWINS, INC., OAKLAND ATHLETICS, and PACIFIC NORTHWEST SPORTS, INC.

Defendants.

Notice of Appeal

SIR:

PLEASE TAKE NOTICE THAT plaintiff, CURTIS C. FLOOD, hereby appeals to the United States Court of Appeals for

the Second Circuit from the final judgment entered in this action on August 13, 1970.

Dated: New York, New York
August 24, 1970.

Yours, etc.

PAUL, WEISS, GOLDBERG, RIFKIND,
WHARTON & GARRISON
Attorneys for Plaintiff
345 Park Avenue
New York, New York 10022
By _____

TO:

The Clerk of the Court
United States District Court
Southern District of New York
Foley Square
New York, New York

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 608—September Term, 1970.

(Argued January 27, 1971 Decided April 7, 1971.)

Docket No. 35424

CURTIS C. FLOOD, *Plaintiff-Appellant,*

v.

BOWIE K. KUHN, *et al., Defendants-Appellees.*

Before:

WATERMAN, MOORE AND FEINBERG, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Cooper, *J.*, dismissing plaintiff's complaint which challenged, as violative of federal and state antitrust law and the Thirteenth Amendment of the Constitution, organized professional baseball's "reserve clause."

Affirmed.

ARTHUR J. GOLDBERG, JAY H. TOPKIS, MAX GITTER, WILLIAM D. IVERSON, Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, New York City, *for Plaintiff-Appellant.*

PAUL A. PORTER, VICTOR H. KRAMER, DOUGLAS G. ROBINSON, Arnold & Porter, Washington, D.C.; George S. Leisure, Jr., John E. Tobin, Donovan, Leisure, Newton & Irvine, New York City, *for Defendant-Appellee Kuhn.*

LOUIS L. HOYNES, JR., LOUIS F. CARROLL, MARK F. HUGHES, BARRY RONA, ROBERT J. KHEEL, Wilkie, Farr & Gallagher, New York City; ALEXANDER H. HADDEN, JAMES P. GARNER, G. WARREN DAANE, SARGENT KARCH, Baker, Hostetler & Patterson, Cleveland, Ohio, *for all Defendants-Appellees except Kuhn.*

WATERMAN, *Circuit Judge:*

Plaintiff and his able counsel have undertaken a comprehensive attack on professional baseball's "reserve system," which, pursuant to nationwide agreements among clubs, effectively restricts a baseball player, if he desires to play professional baseball at all, to contract negotiations with that club in organized baseball which first employs or "reserves" him or with that club's assignee club, and any subsequent assignee clubs, to which in the parlance of the baseball business he has been "sold" or "traded." After an extensive trial below the complaint was dismissed and, with the benefit of an all-inclusive record, this appeal followed. Four counts of plaintiff's complaint are here involved:[1] the first alleges that the reserve system and its boycott sanctions violate the Sherman Act, the second alleges violations of the antitrust laws of the states and the foreign country, Canada, where defendants conduct their business, the third alleges violations of the common law, and the fourth challenges the reserve system under the Thirteenth Amendment. Federal jurisdiction on the second and third counts is premised on diversity of citizenship. For the reasons stated below, we are compelled to affirm the district court's decision.

I.

In *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), a unanimous Supreme Court speaking through Mr. Justice Holmes held that the business of organized baseball was not subject to the Sherman Act because it did not constitute interstate commerce, although it was explicitly

[1] In his complaint plaintiff named as defendants each of the twelve clubs in each of the two major leagues, and, also, in the antitrust cause of action, the president of each league, Charles S. Feeney and Joseph E. Cronin, and the Commissioner of Baseball, Bowie K. Kuhn, individually and in their respective official capacities.

pointed out in the opinion that the clubs composing the Leagues are in different cities and, for the most part, in different states, and that when the clubs meet to play against one another in public exhibitions for money the clubs cross state lines in order to make the meetings possible. In 1953 the Court, with two Justices dissenting, declined, without any reexamination of the underlying issues, to review its 1922 approach despite the considerable change the Court itself had fostered during the intervening thirty years in the defintion of "interstate commerce." The Court indicated that, inasmuch as those interested in the business of organized baseball had relied for 30 years upon the ruling in *Federal Baseball,* remedial action was better left to Congress. *Toolson* v. *New York Yankees,* 346 U.S. 356 (1953). In 1957, in contrast, the Court held that the Sherman Act was applicable to professional football. *Radovich* v. *National Football League,* 352 U.S. 445 (1957).

Although faced with the seemingly inconsistent decisions in *Toolson* and *Radovich,* our court only last summer refused, in *Salerno* v. *American League,* 429 F. 2d 1003 (2 Cir. 1970), *cert. denied,* —— U.S. —— 1971, 39 U.S.L. Week 3298 [2] to depart from the Supreme Court's holding in *Toolson.* As we stated in *Salerno:*

> We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is "unrealistic," "inconsistent" and "illogical." *Radobich* v. *National Football League,* 352 U.S. 445,

[2] It is well settled that denial of certiorari by the Supreme Court does not indicate any decision with reference to the merits of a case. *United States* v. *Shubert,* 348 U.S. 222 (1955); *Agoston* v. *Pennsylvania,* 340 U.S. 844 (1950). This would seem to be particularly true in *Salerno* where the plaintiffs, being umpires, were not subject to the provisions of a player's reserve clause and had "exceedingly difficult obstacles" to overcome in addition to *Federal Baseball and Toolson.* 429 F.2d at 1005.

> 452, 77 S.Ct. 390, 1 L.Ed. 2d 456 (1957). . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privlege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy dispatch. 429 F.2d at 1005.
> b3re0

We adhere to the sentiments we expressed in *Salerno* and are compelled to affirm the dismissal of plaintiff's first count.[3]

II.

We treat together plaintiff's second and third counts, alleging violations of state antitrust laws and violations of the common law.[4] At the threshold we find nothing

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[3] It should be noted that in 1949 two distinguished members of this court, Judge Learned Hand and Judge Jerome Frank, confidently predicted the overruling of *Federal Baseball* insofar as that holding dealt with the reserve system. *Gardella* v. *Chandler*, 172 F. 2d 402 (2 Cir. 1949). In particular, Judge Frank stated:

> "This court cannot, of course, tell the Supreme Court that it was once wrong. But 'one should not wait for formal retraction in the face of changes plainly foreshadowed;' this court's duty is 'to divine, as best in can, what would be the event of the appeal in the case before it.' L. Hand, C.J., dissenting in *Spector Motor Service Co. v. Walsh*, 2 Cir. 139 F.2d 809, 823." 172 F.2d at 409 n. 1.

Inasmuch as shortly thereafter, in 1953, *Toolson* proved these distinguished jurists' prediction to be premature, we do not venture to prophesy the Supreme Court's decision in the present case.

[4] Plaintiff acknowledges that, since *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the common law to be applied in federal court is the common law of the individual states. However, he urges that a federal common antitrust law may be appropriate where

in *Federal Baseball* or in *Toolson* which would indicate, as defendants urge, that the Supreme Court exempted baseball from all antitrust regulation. Nor, on the other hand, do these cases hold, as plaintiff urges, that state antitrust laws apply to baseball. These cases speak only to the applicability of federal antitrust policies: whether state antitrust laws might apply was not directly decided. Thus, we are faced with a question of first impression, and we must consider whether application of state antitrust law to professional baseball is barred by a federal pre-emption of the field under the Commerce Clause.

It appears to be without question that, today, professional baseball, with its complex web of franchises, farm teams and recruiters, and its multi-million dollar contracts with television and radio networks, is interstate commerce. Our difficulty lies in determining to what extent, if at all, the states are precluded from antitrust regulation of interstate commerce. *See* Note, *The Commerce Clause and State Antitrust Regulation*, 61 Colum. L. Rev. 1469 (1961). The Supreme Court has not, to our knowledge, expressed any opinion as to the outer limits of state antitrust policy, although it has clearly held that state antitrust policy is not ousted from the regulation of local maters which may also be affected by federal laws. See *Watson* v. *Buck*, 313 U.S. 387, 403-404 (1941); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 495 (1949. Therefore, we turn for guidance to cases involving other areas of state regulation.

Plaintiff argues that recent Supreme Court decisions have evidenced a trend toward the requiring of an actual

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uniformity among the states is needed. Inasmuch as federal antitrust policy is embodied in Acts of Congress, this approach would seem to be merely an attempt to avoid *Toolson* by entering through the back door.

With reference to applying state common law to the problem here, it is obvious that the arguments based upon varying state statutory antitrust standards are equally applicable to the common law of the several states.

conflict, as opposed to a potential conflict, resulting from differing state regulation if state action is to be precluded under the Commerce Clause.[5] He asserts that, with reference to control over baseball's reserve system, there is no actual conflict among the requirements of state antitrust laws. While we recognize this trend, we do not consider this distinction between actual and potential conflicts to be the sole criterion for finding an impermissible burden on interstate commerce. For example, in taxation cases, there is no conflict between two states taxing the same property, but there may well be a burden on interstate commerce, *Norfolk & W.R. Co.* v. *Missouri State Tax Com'n,* 390 U.S. 317, 323-325 (1968). Also, where the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extraterritorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce. *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 774-775 (1945).

Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional baseball is not to be severally fragmented. On the one hand, it is apparent that each league extends over many states, and that, if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard. The conse-

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[5] Compare *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520, 527 (1959), with *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440, 448 (1960).

quent extra-territorial effect of necessary compliance would be considerably more farreaching than that in *Southern Pacific Co.* v. *Arizona, supra.* On the other hand, we do not find that a state's interest in antitrust regulation,[6] when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law.

We readily acknowledge that plaintiff is caught in a most frustrating predicament, a predicament which defendants have zealously seized upon with great perspicacity. On the one hand, the doctrine of stare decisis [7] binds the plaintiff because of an initial holding that baseball is not "interstate commerce"[8] within the Sherman Act, and, on the other hand, after there have been significant changes in the definition of "interstate commerce," he is now told that baseball is so uniquely interstate commerce that state regulation cannot apply.[8] However, in our own defense, we do

[6] See Note, *supra*, 61 Colum. L. Rev. 1469, 1471-1473 (1961).

[7] We leave to the commentators the relevance of Mr. Justice Holmes' much-quoted comment on precedent to his opinion in *Federal Baseball* and the decision in *Toolson:*

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

[8] Unlike the ballplayers, baseball management has been quite adept at forecasting legal decisions. In *Federal Baseball* counsel for the defendants opened his argument: "Organized Baseball is not interstate commerce . . ." 259 U.S. 200, 206 (1922). Having obtained an exemption from the Sherman Act under the legal standards of 1922, professional baseball can now properly urge that baseball in 1971 is indeed both interstate and international commerce.

that all avenues toward such an approach certainly have not yet been fully exhausted.

From the trial record and the sense of fair play demonstrated in the main by the witnesses on both sides, we are convinced that the reserve clause can be fashioned so as to find acceptance by player and club.

Far more complicated matters, accompanied by an exclusive self-centered concern and by seemingly hostile and irreconcilable attitudes, frequently find their way to amicable adjustment and the abandonment of court claims. Why not here—with the parties positive and reasonable men who are equally watchful over a common objective, the best interests of baseball?

Conclusion

For the first time in almost fifty years opponents and proponents of the baseball reserve system have had to make their case on the merits and support it with proof in a court of law. As a long line of litigation and congressional inquiry attests, this system has often been a center of controversy and a source of friction between player and club. Existing and, as we see it, controlling law renders unnecessary any determination as to the fairness or reasonableness of this reserve system.[19] We are bound by the law as we find it and by our obligation to "call it as we see it."

Although a resolution of the merits of the reserve system would be inappropriate at this time, it is nevertheless our hope that by obtaining a complete record covering not only the threshold question of whether plaintiff states a cause of action, but the merits of his claims as well, we may have

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[19] Admission into evidence of plaintiff's exhibits 28, 29 and 34 for identification is contested. Since we do not reach the merits of the reserve system, resolution of their admissibility is unnecessary. Assuming *arguendo* that such exhibits were in evidence, our decision herein would be unaffected.

obviated the possibility of piecemeal determinations and consequent delay.

The foregoing opinion constitutes this Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P.

For the reasons already set forth, the Clerk is directed to enter judgment in favor of defendants and against plaintiff on each cause of action herein.

So Ordered:

New York, N.Y.
August 12, 1970

|s| Irving Ben Cooper
United States District Judge

Since the suit was based on the antitrust laws which in turn involved interstate commerce, the Court of Appeals after reviewing the *modus operandi* of the two major leagues and their regulatory body, the National Commission, discussed the case in relation to these laws and directed itself to answering the question whether baseball exhibitions constituted "trade or commerce within the meaning of the Sherman Act?" and involved interstate commerce.

The court concluded that a "game of baseball" was purely "local in its beginning and in its end" and that although the players traveled from place to place in interstate commerce, "they are not the game." The Court said, "Not until they [the players] come into contact with their opponents on the baseball field and the contest opens does the game come into existence."—hence—"the game effects no exchange of things according to the meaning of 'trade or commerce.'" *National League of Prof. Baseball Clubs* v. *Federal Baseball Club of Baltimore, Inc.*, 269 Fed. 681, 684-685 (D.C. Cir. 1920).

The court also considered the restrictive clauses (as here) in the players' contracts as allegedly violative of the antitrust laws and commented that "If the reserve did not exist, the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them." Moreover, the reserve clause had the effect "of preventing players from disregarding their obligations." 269 Fed. at 687. The case was then argued before the Supreme Court.

This somewhat lengthy preamble is deemed necessary both to understand and put in proper perspective the Supreme Court decision,[2] featured in appellant's and appel-

[2] *Federal Baseball Club of Baltimore, Inc.* v. *National League of Prof. Baseball Clubs*, 259 U.S. 200 (1922).

lees' arguments. The syllabus of the arguments reveals that the points urged in 1971 were not dissimilar to those urged in 1922. In a brief opinion, Mr. Justice Holmes wrote for the court (there being no dissent): "The decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery." 259 U.S. at 208. The Court adopted the lower court's concept of baseball exhibitions as "purely state affairs" and that interstate transportation of players and equipment was only incidental thereto. 259 U.S. at 208, 209. In short, the Court held that the personal efforts of the players was "not a subject of commerce," and that "restrictions by contract that prevented the plaintiff from getting players to break their bargains * * * were not an interference with commerce among the States." 259 U.S. at 209.

After this decision some 31 years elapsed during which the New York Yankees and Giants vied for supremacy in many of these years in World Series before huge crowds concentrating in New York from the then 48 States. Other clubs broke the Yankee-Giant monopoly without the aid of antitrust laws and achieved championship rank, including the Senators, the Reds, the Tigers, the Athletics and the Cards (the cities can be identified without footnotes).

In the interval between 1922 and 1953, this court considered a suit based upon the alleged illegality of the reserve clause in *Gardella* v. *Chandler*, 172 F.2d 402 (1949). Although by a two-to-one decision the court remanded the case for trial, Judge Ffank's prediction that the Supreme Court had "completely destroyed the vitality of *Federal Baseball*" and had "left that case but an impotent zombie." 172 F.2d at 408, 409, turned out to be highly inaccurate in the light of the Supreme Court's subsequent 1953 and 1957 decisions.

In 1953, on facts not dissimilar from those of this case, the Supreme Court again had an opportunity to examine

(or better to re-examine) organized baseball through antitrust glasses. *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953) had originated in a suit by Toolson, a professional baseball player who claimed that while under contract with Newark his contract was assigned to Binghamton. He refused to report to Binghamton and was placed on an ineligible list, thus preventing him from playing. On motion the action was dismissed "for want of jurisdiction." The district court relied on the Supreme Court's decision in *Federal Baseball* and referred to the many cases in which that decision had been cited with approval.[3] The Ninth Circuit Court of Appeals affirmed on the lower court's opinion. 200F.2d 198 (1952).

The Supreme Court in its decision left no doubt "that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws," and that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U.S. at 357. The majority commented that for thirty years Congress had allowed baseball "to develop on the understanding that it was not subject to existing antitrust legislation" and that any change should be made by congressional action. *Id.* The Court did not restrict itself to federal or state laws but said "existing antitrust legislation." *Id.*

During the intervening years from 1922 to date, other sports developed their professional intercity teams, formed leagues and achieved a public popularity scarcely envisioned in the earliers days. As communications facilities and techniques developed that which was clicked out by telegraph key or transmitted by telephone was superseded by radio and television. However, the interstate transmission of news was not changed; only the methods. Although arguments are made by court and counsel based upon alleged

[3] 101 F.Supp. 93, 94 (S.D. Cal. 1951).

factual changes with respect to interstate communications, the business of baseball has not changed its interstate character over the years. Of necessity it has always been interstate. Now there are more viewers across the nation but this fact is not relevant to the interstate nature of the sport except to make it more so.

In 1954 two types of entertainment by means of public exhibition sought to take advantage of *Federal Baseball* and *Toolson, i.e.,* theatrical performances and boxing. Interstate commerce was definitely involved in both cases and in each case the government's antitrust complaint had been dismissed on motion in reliance by the district court on *Federal Baseball* and *Toolson. United States* v. *Shubert,* 348 U.S. 222 (1955) and *United States* v. *International Boxing Club of New York, Inc.,* 348 U.S. 236 (1955), decided the same day. In *Shubert* the Supreme Court interpreted *Federal Baseball* as "dealing with the business of baseball and nothing else," and that *Federal Baseball* "did not automatically immunize the theatrical business from the antitrust laws." 348 U.S. at 228, 229. As to *Toolson* the Court said, "For over 30 years there had stood a decision of this court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause,'" a ruling which Congress had actively considered but which it had "not seen fit to reject [it] by amendatory legislation." 348 U.S. at 229. In *International Boxing Club* the Court refused to extend the baseball exemption to boxing but continued to recognize the unique position of organized baseball as buttressed by *Federal Baseball* and *Toolson.* See 348 U.S. at 242.

Two years later the Supreme Court had to face the claim of a professional football player that the National Football League, its member clubs and the commissioners of two leagues had conspired to violate the antitrust laws because of a restrictive player contract. *Radovich* v. *National Football League,* 352 U.S. 445 (1957). Again the Supreme Court

clearly indicated that organized baseball still occupied its exempt status, saying, "[W]e now specifically limit the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball." 352 U.S. at 451. The Court stated its reasons for its limitation:

> "The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years."

352 U.S. at 450.

The Court's own policy for the future was set forth: "As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those [*Federal Baseball* and *Toolson*] cases." 352 U.S. at 451. That interpretation was: "But *Federal Baseball* held the business of baseball outside the scope of the Act." 352 U.S. at 452. The Court recognized that "the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance." but concluded that "[t]his is not a new approach. See *Davis* v. *Department of Labor*, 317 U.S. 249, 255 (1942); *compare Rutkin* v. *United States*, 343 U.S. 130 (1952)." *Id.*

The last word from this court is to be found in *Salerno* v. *American League of Prof. Baseball Clubs*, 429 F.2d 1003 (1970), *cert. denied*, 400 U.S. 1001 (January 12, 1971). The suit was brought in the district court by two discharged umpires who claimed that their discharge was caused by their endeavor to organize American League umpires for collec-

tive bargaining. Charges of unfair labor practices were also filed with the National Labor Relations Board. The motion to dismiss the cause of action based on the antitrust laws was granted. On appeal this court said that there was "serious doubt whether the complaint here stated a claim under them [antitrust laws]," but then went on to discuss the likely overruling of *Federal Baseball* and *Toolson*. The court recognized that *Toolson* was based upon the ground that "Congress had no intention to bring baseball within the antitrust laws, not that baseball's activities did not sufficiently affect interstate commerce." The dismissal was affirmed, the court reserving for the Supreme Court "the exclusive privilege of overruling its own decisions." 429 F.2d at 1005.

In my opinion there is no likelihood that such an event will occur. As I analyze the history of organized professional baseball over the last 50 years, it has shown without Court interference remarkable stability under self-discipline. The Supreme Court in 1922 undoubtedly felt that it should adopt a "hands off" policy as to this one particular sport which had attained by then such a national standing that only Congress should have the power to tamper with it. And properly so. Baseballs' welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record.

Just as the Supreme Court in 1955 recognized that baseball "had grown and developed" and "in reliance on the *Federal Baseball* precedent," *United States* v. *Shubert*, *supra*, 348 U.S. at 229, so much the more has it grown between 1955 and 1971. The eight teams in each league have been expanded to twelve. Thus twenty-four teams are playing intersectional games in many cities which did not have

major league exhibitions available in former years. The reasons for adopting a "hands off" policy by the courts of this particular sport have multiplied. Congressional and Labor Board attention is being given in such areas of baseball as may be appropriate for regulation.

Appellant argues that even if this court follows *Federal Baseball* and *Toolson*, "THEN IT MUST SUBJECT BASEBALL TO STATE LAWS." True, in *Federal Baseball* the distinguished justice did refer to baseball exhibitions as "purely state affairs." But from this reference does not follow the conclusion that, therefore, state antitrust laws apply. To the contrary, the decision was based upon the assumption that baseball is "not a subject of commerce." 259 U.S. at 209. However, if there were to be any doubt, the Supreme Court itself resolved those doubts in *Toolson*.

The organization of professional baseball as it now exists cannot be better stated than in the findings of fact of the trial court and in the opinion of Mr. Justice Fairchild in *State* v. *Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1 (1966). Equally well set forth are the reasons why organized professional baseball could not possibly be subjected to the antitrust laws of the several States in which the games are played.

Therefore, without any reservations or doubts as to the soundness of *Federal Baseball* and *Toolson*, I would affirm the decision below on all four counts and would limit the participation of the courts in the conduct of baseball's affairs to the throwing out by the Chief Justice (in the absence of the President) of the first ball of the baseball season.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of April one thousand nine hundred and seventy-one.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
Circuit Judges.

CURTIS C. FLOOD, *Plaintiff-Appellant,*

v.

BOWIE K. KUHN, Individually and as Commissioner of Baseball, et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

[Docketed May 12, 1971]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Curtis G. Flood

[11] Direct Examination By Mr. Goldberg:

Q. What is your occupation, Mr. Flood? [12] A. I am a professional baseball player. I play centerfield.

Q. And when did you first begin to play baseball? A. I started at age nine, of course, and I played Little League ball, sandlot ball, American Legion ball right into high school.

The Court: There is only one thing I didn't say. I didn't know that you rush your words. Take your time.

The Witness: Yes, sir, I will.

The Court: Very well.

Q. And also speak up so I can hear you, too, in addition to his Honor.

When did you graduate from high school? A. In 1968—1958; excuse me.

Q. And you, of course, are a professional ballplayer now? A. Yes, sir, I am.

Q. When did you first begin to play professional baseball? A. That was in 1958.

Q. And did you sign a professional baseball contract at that time? A. Yes, sir.

[13] Q. And how old were you when you first signed your professional baseball contract, the first that you signed? A. I was eighteen.

Q. Do you know from your experience as a ballplayer, which I take it has extended since that time in professional baseball, of other ballplayers who signed their first professional baseball contract under the age of twenty-one? A. Yes, sir, practically all of the gentlemen that I know signed prior to age twenty.

Q. When you mentioned '50—and you relax on the stand—do you not really mean '56? A. Yes, sir. I am sorry.

Q. If you think back. A. 1956.

Q. 1956. A. I am sorry.

Q. And with whom did you sign your first contract in 1956? A. I signed with the Cincinnati Reds.

Q. I think we all know that they are a major league team. That was the first major league contract that you signed? A. Yes.

Q. Now, you were presented with a contract at that time [14] for signature? A. Yes, sir.

Q. Did you read it? A. Well, not really. I knew very little about contracts and the provisions of them.

Q. Did you consult with a lawyer before signing your first baseball contract? A. No, sir.

Q. Did you consult with anyone? A. No, sir.

Q. Now, at that time, when you signed your first professional contract entering professional baseball, were you familiar with what has become in popular terms to be called the reserve rules of organized baseball? A. No, sir, I knew very little about them.

Q. Were you familiar with the rules regulating trades of professional baseball players? A. No, sir, I was not.

Q. When you signed your first contract in 1956, what salary did you sign for in that very first contract? A. It was $4,000.

Q. Did that result from a negotiation with the Cincinnati Redlegs? A. Well, not really. There was a bonus rule at the [15] time where if you received more than $4,000 there was sort of a penalty involved. You would have to stay on the roster of the parent club for at least one year. I forget the exact years. And 4,000 was the limit that I could sign for.

Q. You mentioned the bonus provisions which existed at that time. Did you actually receive a bonus for signing your first contract? A. No, sir, I did not.

Q. So is it fair to say that $4,000 was what you were receiving from your first major league professional contract? A. Yes.

Q. Were you handed a copy of the contract you signed on that occasion? A. Yes, I was.

* * * * * * * * * *

not consider our decision to be internally inconsistent. In disposing of the Sherman Act count in plaintiff's complaint, we are bound by Supreme Court decision, while in our disposition of the state and common law counts, we must of necessity decide this question of first impression by present Commerce Clause standards and not the standards applicable in 1922. Any apparent inconsistency results not from faulty logic, but from the vagaries of fate and this court's subordinate role to the Supreme Court.

The defendants also claim that under federal labor law the reserve clause is a subject of mandatory bargaining between the ball players and the club owners and, therefore, that federal labor policy exempts the reserve system from state regulation. Because of our disposition of plaintiff's second and third counts on Commerce Clause grounds, we find it unnecessary to reach this additional contention.

III.

Inasmuch as plaintiff retains the option not to play baseball at all, his Thirteenth Amendment argument is foreclosed by this court's decision in *United States* v. *Shackney*, 333 F.2d 475 (2 Cir. 1964), a decision which we adhere to as sound.

The judgment of dismissal is affirmed.

Moore, *Circuit Judge* (concurring):

Baseball for almost a century has been our country's "national" sport. Every decade since the days of Abner Doubleday and A.G. Spalding has developed outstanding players, heroes in the hearts and minds of millions of Americans—heroes whose names are enshrined in a baseball "Hall of Fame." In this century alone the names of such players (to select a few) as Christy Mathewson, Walter Johnson, the remarkable Ty Cobb, Babe Ruth of home-run fame, Lou Gehrig and more recently Ted Williams and

Willie Mays were probably better known to a greater number of our populace than many of our statesmen; and their exploits better remembered than the activities of our outstanding public figures. Such slogans as "Tinker-to-Evers-to-Chance" became by-words. Even big businesses—at least their employees—were apt to subordinate their important affairs to baseball at the time of the October World Series. And such names as the Dodgers, the Yankees, Cubs, Giants and Braves were household words. In short, organized baseball existed almost as an enclave or feudal barony throughout the years, managing its own affairs as best calculated to preserve the sport and maintaining its own officialdom for self-regulation purposes—and, except for the brief scandal of the so-called Chicago Black Sox of 1919, apparently has handled its little kingdom and its subjects very well.[1]

Until 1913 there were two leagues, the National and the American, which were known as the major leagues, each league consisting of eight teams in major cities of the country. In that year a new league came into being, the "Federal League of Professional Baseball Clubs." This league issued franchises to clubs also in various cities, some of which had teams in the National and American Leagues. The "Federal League" continued in existence until December 1915 when by agreement with the National and American Leagues it and its constituent clubs dissolved except for the "Federal Baseball Club of Baltimore, Inc." (Baltimore). Asserting that the dissolution was caused by acts in violation of the federal antitrust laws, Baltimore brought suit for treble damages against the major leagues and certain of their officers. A judgment of $240,000 was obtained by Baltimore. Upon appeal to the Court of Appeals, the judgment was reversed with instructions to enter judgment for the defendants in the suit.

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[1] For a detailed description of modern baseball organization, see the findings of fact in *State* v. *Milwaukee Braves, Inc.*, 31 Wis.2d 299; 144 N.W.2d 1, 3-5 (1966).

[35] Q. Will you tell us what your batting average has been since you started to play full time in 1962, refreshing your recollection from that card? A. In 1962 I hit .296, from there on .302—

Q. Give me the year. A. '63. In '64 it was .311; in '65 it was .310; [36] 1966, .267; 1967, it was .335; 1968, it was .301; and 1969 it was .285.

Q. Are you any kind of a mathematician? Can you average this for us? A. Yes. My major league average throughout the years is .293.

The Court: To be absolutely sure, that takes in what years?

The Witness: From 1958, sir.

Q. Up to last year and including last year?

The Court: Including '69? A. Yes, sir.

Q. And I notice that in the last year, if I heard you correctly, you said your batting average was .285? A. Yes, sir.

Q. It was a little below that average, is that correct? A. Yes, sir.

Q. And you know, I assume, as a professional player and a member of the club what the batting averages were of your colleagues on the team? A. Well, this represented the second high on the team.

Q. On the team? [37] A. Yes.

Q. For that year? A. For that year.

Q. Now, as best you can recall, can you give his Honor your recollection of your salary payments from the time when you began to play full time? A. Well, after 1961 to '62 season, my salary jumped maybe from eight to ten thousand dollars a year, up until last year.

Q. There were progressive increases? A. Yes.

The Court: Would you give us, as you best recall, those figures? They will be given with greater exactitude later on by counsel for the other side, but now, as you best remember, what did those figures amount to, roughly?

The Witness: I don't think I can do that, sir. I apologize.

The Court: It is all right.

Mr. Hughes: We have the data right at hand. I don't want to interrupt Justice Goldberg.

Mr. Goldberg: It would be very helpful. I will ask the witness if this coincides with his recollection. I didn't want to ask you on a moment's notice to produce something I did not know you had.

[38] The Court: This is typical of the kind of cooperation I mentioned earlier.

Mr. Hughes: The record indicates that for 1961 Mr. Flood's salary was $12,500 with a bonus of $1,000 for signing his contract; in 1962 his salary was $16,000; in 1963 his salary was $17,500—do you want me to take this all the way down?

Mr. Goldberg: It might be helpful to complete the record.

Mr. Hughes: In 1964, $23,000; 1965, $35,000; 1966, $45,000; 1967, $50,000; 1968, $72,500; 1969, $90,000.

The Court: Thank you, Mr. Hughes.

Q. During that period—does that coincide pretty generally with your recollection, Mr. Flood? A. Yes, sir, it does.

Q. If I remember correctly, there was a World's Series that entered into—was it one of those years? A. There were three, sir.

Q. Three? A. Yes, sir.

[39] Q. Which years were they? A. 1964, 1967 and '8.

Q. And do you recall—I guess the figures show this—that after a World Series there is a jump in salary for the regular players? A. Yes, there is.

Q. And you benefit from that? A. Yes, sir.

Q. During your career as a regular player for the St. Louis Cards, have you won any titles, professional, journalistic, or awards for your baseball playing during those years? A. Yes, I have. I—

Q. Would you tell his Honor what they were? A. I won seven Golden Glove awards. I was chosen for the All Star team three times. I have a record for errorless ballgames. I think it's 223 consecutive games of errorless baseball.

Q. I meant to ask you that; you anticipated me. We heard about your batting average, but these awards were given for your fielding exploits; is that correct? A. Yes, sir.

Q. I take it like all human beings you are not always perfect in your performance; is that correct? [40] A. That's very true.

Q. You have made errors on occasion, too? A. Yes.

Q. Small or big ones? A. There have been some big ones and some small ones.

Q. On the team itself, did you receive some recognition from the management and the team itself in terms of your playing performance? A. Yes, I did, sir. I was voted co-captain in 1965 and I was—I held this position up until last year.

Q. Who votes you co-captain of a team? A. Well, the front office actually appoints you to co-captain.

The Court: Who in the front office?

The Witness: This would be Mr. Devine—no, excuse me. This would be Mr. Howsam at this time.

The Court: Who was he?

The Witness: The general manager.

Q. When you are designated a co-captian of the team, as you were, did you receive any extra compensation above your regular compensation for being a co-captain? A. Yes, you get $500 a year.

Q. As a summary record of your testimony so far, you played centerfield—that was your position? [41] A. Yes.

Q. —through the 1969 season for the St. Louis Cardinals; is that correct? A. Yes.

Q. Have you ever been fined by the Cardinals? A. Yes, I have.

Q. And would you tell the circumstances to his Honor, when and under what circumstances you were and by whom? A. Well, I was fined by the general manager $250 for missing a banquet.

Q. When was that? A. This was last summer. I don't recall the exact date.

Q. '69? A. In 1969, though, yes.

Q. And why did you not appear at that promotional banquet? Those are customary in baseball to help the team? A. Well, I suffered an injury the day prior to the banquet and I—I did not expect them to—I didn't think they expected me to be there because of this injury.

Q. What kind of injury? A. It was a spike wound about 5 or 6 inches across my leg.

Q. Now, in 1969—

[42] The Court: I am somewhat disappointed with that answer. I thought it was because he wanted to avoid the typical banquet food.

Mr. Goldberg: Your Honor—

The Court: That is worth paying a fine for.

Mr. Goldberg: As I have discovered.

Q. Now, let us bring it up then to 1969. In that year you were traded by the Cardinals to the Phillies? A. Yes.

Q. Philadelphia. When did you first learn from the management of the St. Louis Cardinals that you had been traded? A. Well, the date escapes me right now, but they —they call me on the telephone. I am sure you have the date there somewhere of the trade.

Q. Was it in October? A. It was in October, yes.

Q. Beginning of October.

The Court: Let's be exact about it.

Mr. Goldberg: Yes.

The Court: State the year for the record.

Mr. Goldberg: 1969, your Honor.

The Court: Is that right, 1969?

The Witness: Yes, sir.

[43] The Court: All right.

Q. And will you now, heeding his Honor's correct advice, say specifically from whom you received a call, if that is what it was, identify him by name, and also was it a telephone call, was it a personal conversation. Be very specific now and recite what the other party to the call said and what you said. A. Well, I first learned of the trade by telephone.

Q. From whom? A. From Jim Toomey, who was the assistant to the vice—assistant to the general manager of the St. Louis Cardinals.

Q. Assistant to Mr. Devine. I think you identified him before. A. Yes, sir.

Q. Vaughan Devine, the general manager? A. Yes.

Q. What is Mr. Toomey's first name, do you know? A. Jim.

Q. Jim Toomey. And you received a call from Mr. Toomey. What did he say to you and what did you say to him? A. Well, he informed me—

Q. Was it a telephone call? A. Yes, sir, it was a telephone call.

Q. Where were you at the time? [44] A. He called me in my home.

Q. In St. Louis? A. Yes.

Q. And will you relate to his Honor what he said and what you said? A. Well, he told me he had some bad news for me. He said that my contract had been traded to the Philadelphia Phillies, and then he went on to relate the other people that were involved in the trade.

Q. Well, just say what he said.

The Court: I am sorry—

The Witness: I'm sorry, your Honor.

The Court: —this was 1969, comparatively recently; right?

The Witness: Yes, sir.

The Court: You mustn't say what he told about the other players. What did he say, what other players? You see, you mustn't sum it up. You must give us what you best recall was said.

Now, will you try and always bear that in mind? Try it again.

The Witness: Yes, your Honor.

The Court: Yes.

A. (Resuming) He related that I had been traded to [45] Philadelphia for Richie Allen, a pitcher named Johnson—I am sorry, but the names don't come to me.

The Court: All right. Go ahead.

A. (Resuming) A Byron Brown from our ball club and a Tim McCarver, also from the St. Louis Cardinals' ball club. And I thanked him very kindly and I hung up.

The Court: And that was all that you remember of that conversation?

The Witness: Yes, sir.

The Court: Next question.

Q. Did you receive another telephone call from anyone else in the management of the St. Louis team? A. Yes.

Q. In this connection, in 1969, in October? A. Yes, I—

Q. From whom? A. I also talked with the general manager Bing Devine.

Q. Did he call you or did you call him? A. No, sir, I called him.

Q. You telephoned Mr. Devine? A. Yes.

Q. Were you again in St. Louis? A. Yes, I was.

Q. When would this have been, the same day, or a few days [46] after? A. It was the same day.

Q. You called the general manager, Mr. Devine? A. Yes, sir.

Q. And again, to the best of your recollection of that call, would you tell his Honor what you said and what Mr. Devine said? A. Well, I told Mr. Devine that I didn't think I was going to report to Philadelphia, mainly because I—I didn't want to pick up 12 years of my life and move it some—

Q. This is the conversation? A. Yes, this is the conversation.

Q. Don't give us your, you know, subconscious motivation. Recite what you said. A. I told him that he was—I probably would not go to Philadelphia because I didn't want to move my businesses, my friends and my family to another part of the city, another part of the United States, at least.

Q. And what did he say to you? A. Well, he said that that was my business and—and we said goodbye.

The Court: That is all that you remember of that conversation?

The Witness: That's all I remember.

[47] The Court: Very well.

Q. Now, you received a written communication, did you not, in reference to this? A. Yes.

Mr. Goldberg: And, if I may have it, perhaps with your Honor's permission, I will identify it for the record.

May I ask the clerk to mark the first as Plaintiff's Exhibit 1 for identification and the second as Plaintiff's Exhibit 2 for identification.

(Plaintiff's Exhibits 1 and 2 marked for identification.)

* * * * * * * * * *

[50] Q. Mr. Flood, prior to the telephone calls that you have described and the written notices which have been put in evidence, were you consulted by anyone in the management of the Cardinals about your trade? A. No.

[51] Q. That was the first notice you received about the telephone call that you have related, is that correct? A. Yes.

Q. And if I recall now—you correct me—this means that prior to the notification you played with the Cardinals 12 years, is that correct? A. Yes.

Q. Now, you have said in your testimony, in your conversation, that St. Louis was your home and you had established yourself there. Will you describe to his Honor what you meant by that? What did you do in St. Louis? A. Well, I operate several photographic studies—two, as a matter of fact—and I have a portrait studio that I operate in St. Louis, and there is a franchising company in Chicago that is franchising my studios throughout the country.

Q. Are you a photographer yourself? A. No, I am a commercial artist, though.

Q. You are an artist? A. Yes.

Q. Is this a business that you established? A. Yes, it is.

Q. And you have how many—I didn't quite hear you be-

cause you are not talking up enough. [52] A. I have two photographic studios in St. Louis..

Q. In St. Louis. A. And one portrait studio in St. Louis.

Q. Yes. And then you have a franchise operation al[redacted] A. Yes.

Q. Elsewhere? A. Yes.

Q. Would you describe that to his Honor and tell us what that consists of? A. Well, we are in the business of taking school cap and gown pictures, school photographs, underclassmen pictures, and these studios are being franchised. There is one in Evanston, Illinois, for instance. This is our first one. And we are in the process of franchising other ones throughout the country.

Q. And in addition to that, you are a commercial artist? A. Yes, sir.

Q. Do you do portraits; is that what you essentially do? A. Yes, I do portraits.

Q. When did you start that type of business, the artist part and the photography part? A. As an artist, I have been painting for, oh, nine [53] or ten years, but the photography studios I just started two years ago.

Q. Now, at the time that you received the notification of your trade did you have any intention about playing baseball for this current season? A. Yes, I did.

Q. And what was that intention? A. Well, to play as long as I possibly could, including this year.

* * * * * * * * * * *

[63]. Q. Now, why did you bring this lawsuit? A. Well, I didn't think that after twelve years I should be traded and treated like a piece of property.

[64] Q. Now, you said in your testimony that you wanted to continue to play for the Cardinals? A. Yes.

Q. Would you play for any other team? A. Yes; I would.

Q. And under what circumstances? A. If I had the choice of playing for whom I chose, or whoever offered me the best deal.

Q. Now, again, calling upon your expertise as a ballplayer of considerable standing, you have followed the careers of other ballplayers? A. Yes.

Q. And you are now how old? A. I am thirty-two.

Q. From your knowledge of and experience in baseball, do you have an opinion as to how many additional years you can enjoy and pursue a career in major league baseball? A. Yes.

Q. In your opinion, how many years would that be? A. I could play five years easily.

Q. Until thirty-seven? A. Yes.

Q. Do you know of your own knowledge whether there are ballplayers, or have been in recent years who have [65] played under similar circumstances outfield and other positions for that span of time? A. Yes.

Q. Would you mention some names from your own knowledge? A. Stan Musial. He played until he was forty.

Hoyt Wilhelm. He played well over forty.

Oh, Ted Williams, I think. Willie Mays. Henry Aaron.

Q. You don't want to skip New York, do you? Mickey Mantle is one also. A. I'm sorry, Mickey Mantle.

Q. Now, would you tell his Honor what kind of physical condition you are in? A. Excellent.

Q. How do you know that? A. Well, I work out several times a week and I feel that I am in good condition.

Q. Now, again drawing from your experience, could you anticipate that during those five years that you said you felt you had a reasonable baseball life that you could command a salary of $90,000 during that period as a professional ballplayer?

Mr. Hughes: Your Honor, I object to that as highly [66] speculative. A lot of things can happen in five years.

The Court: What do you say to that?

Mr. Hughes: I don't see how anybody is capable of any expertise in that regard.

The Court: What do you think of that?

Mr. Goldberg: Well, he is an expert witness, your

Honor, and this is an opinion which is allowed an expert witness. The opinion can be quarreled with and contradicted.

The Court: I will take it and give it such weight as I think it deserves.

Will you please, Mr. Court Reporter, repeat the pending question to the witness?

Q. You said as an expert in baseball conversant with baseball—

The Court: Please, Judge.

Mr. Goldberg: Oh, the reporter. I didn't hear you, your Honor.

The Court: I like on occasion to show them off. They are remarkable. They are really remarkable.

Come through for me now, Mr. Reporter.

(Read.)

A. Yes, I do.

The Court: "Yes" is the answer. Next question.

Q. You are not playing baseball at the present time? [67] A. No.

Q. Now, again, as an expert, do you have an opinion as to whether a layoff of this season is affecting your skill as a ballplayer? A. Yes.

Q. On what do you base that opinion? A. Well, having to lay off for just a few weeks I notice has hurt a lot of ballplayers and I am sure I am no different.

Q. Would that apply, for example, to another season, in addition to this one, next year? A. Yes, it would.

* * * * * * * * * * *

[106] Q. And I had understood you to say that Mr. Quinn at one point offered you something in excess of $100,000 to play in Philadelphia; is that correct? A. Yes.

Q. Plus some sort of an allowance— A. No, sir, that is not correct. He offered me $90,000, then very close to $8,000 in spring training expenses.

Q. Well, it is not earth shaking in importance, but was

the net of it that he offered you an amount in excess of $100,000 or was it under $100,000? A. It was under 100,000.

Q. But in excess of 90,000? A. Yes.

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[128] Cross Examination by Mr. Hughes: This is a letter dated March 4, 1970 to Mr. Flood:

"Dear Curt:

"You are hereby notified that, pursuant to Paragraph 10(a) of your Uniform Players Contract dated March 3, 1969 entered into with the St. Louis National Baseball Club, Inc., and assigned to this club, this club hereby renews the [129] said contract for the period of one year on the same terms, including $90,000 compensation payable to you.

"Pursuant to Regulation 6 of said contract, you are hereby directed to report forthwith to Clearwater, Florida, for spring training practice and participation in exhibition games of this club. Upon your arrival in Clearwater, Florida, your travel expenses will be reimbursed.

"Sincerely yours."

That is signed by John J. Quinn, vice-president and general manager.

Q. Mr. Flood, did the Philadelphia club forward you a contract for the 1969 year? A. Yes.

Q. You did not sign it? A. No.

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Marvin J. Miller

[139] Direct Examination by Mr. Goldberg:

* * * * * * * * * * *

[140] Q. How long have you held your present position with the Major League Baseball Players Association? A. Since July 1, 1966.

Q. Where is the office of that Association, the principal office? A. 375 Park Avenue, New York City.

Q. Perhaps I should not have said principal. Is that the only office? A. I am afraid so.

Q. Can you describe to his Honor, Judge Cooper, what the Major League Baseball Players Association is? A. It is an organization composed of the Major League Baseball players, coaches, trainers and managers. It is an unincorporated association. It is a labor organization within the meaning of the law.

Q. And what are your duties as executive director of the Association?

* * * * * * * * * * *

[144] Q. Now, therefore, from that experience and your study would you explain to the Court how the reserve system operates in actual practice?

[145] The Court: Now you can expand.

The Witness: Thank you.

A. Well, I am glad you—

The Court: No, no.

A. It is true that in explaining how it operates it must be explained as a system rather than as a clause, because there is no such thing as a clause.

Players from the time they first want to be professional baseball players begin to be affected by operations of the reserve clause system. For example, there is something known as the so-called free agent draft. This is a draft which is held twice a year and it is a draft of players who have not yet signed their first contract.

Q. Is this either in the major leagues or the minor leagues or in both? A. In both.

Q. This is organized baseball? A. Yes.

Q. Does that encompass the minors and the majors? A. It does. Such would-be professional players do not have a choice in terms of dealing with a particular club or a group of clubs. When they are drafted, they are told that there is only one club that they may deal with.

Q. Before you go into that, would you explain to [146] his Honor what is meant by when they are drafted? What

is a draft system? A. At the two draft meetings which are held each year there are names of players and a system of selection by which each club in turn indicates what its choice is. Club A may decide that its first round choice is John Jones. The clubs pick in the first round on the basis of their standing in their leagues. In other words, in one of the drafts it is based on the standings at the close of the prior season, with the last place clubs getting the first pick and so on until the World's Series winner gets the last pick.

The other draft is held in somewhat the same fashion but it is based on the standings as of a particular date rather than the prior year.

Q. Is that a particular date during the course of the baseball season? A. Yes.

Q. Do you remember what that date is? A. No, I do not.

Mr. Goldberg: We will furnish it, your Honor, for the record.

Q. Starting with the first draft, and you will explain whether the second one is different, do I take it—and you correct me if I am wrong—here is a baseball [147] player who aspires to enter organized baseball. Where would he come from at that stage? He is a young player. Where would he come from? A. He might come from a high school, he might come from a college ball team, he might come from other types of organized activity that is not considered organized professional baseball such as an American Legion program, and I believe there are others.

Q. That type of activity would not be part of the structure that is called organized baseball? A. That is right.

Q. And then would you go on and explain what happens then? A. A player who is so drafted is advised the name of the club which is the only one that he may deal with. The [redacted]al procedure then is attempted negotiation. The club that has picked him would like to sign him to a contract. The player at that point has only two alternatives. He may accept what is being offered or he may decline, in which

case no other club can approach him until the next draft six months subsequently, at which time he can be drafted again, but not by the club which drafted him first, and which he refused to sign with.

Q. On the second draft, what happens? [148] A. Really the same thing. Another club will draft that player, and at this point he has the same alternative, to sign on the club's terms or not play ball.

Q. How long has the draft system, as such, been part of the reserve system of organized baseball? A. This draft that we have been talking about, this so-called free agent draft, is about four or five years old.

Q. Are you familiar with what happened prior to that time? A. Yes.

Q. Will you tell his Honor what happened prior to this innovation four or five years ago? A. Prior to that time a player not being drafted was perfectly free to solicit offers from any and all clubs that he could and attempt to negotiate the best arrangement that he could for himself. As far as I know, there were no restrictions whatsoever because then such a player really was a free agent.

Q. I take it from what you have said that the change was introduced four or five years ago? A. Yes.

Q. Does that relate in any way to the so-called [149] bonus system in baseball? A. Yes, it does.

Q. In what way? A. I am not expert on all of the aspects of the bonus system. One of the obvious ways that it has had an impact is that the bonuses paid to such free agent have fallen markedly in amounts ever since the draft was first instituted, for rather obvious reasons. Since the player who is now drafted has little or no bargaining power, it is to be expected that bonuses which are designed to make a player sign or get him interested in signing would fall under such circumstances, and that is precisely what has happened.

Q. You have studied the figures on this as part of your duties as executive director of the Association? A. I have studied the available figures.

Q. Those made available to you by whom? A. Made available to me by players, made available to me by the parents of some players, and made available to me by agents who have kind of entered this picture, agents of youngsters subject to the draft.

Q. After a draft occurs, what happens then?

The Court: Every time you use the word "draft" you mean baseball draft?

[150] The Witness: Yes, sir.

A. Well, if the player eventually signs a contract with the club that drafted him, from then on he is the property of that organization. He signs a contract which in some cases is a major league contract such as has been described here, or he might sign a minor league agreement, which has certain differences but not significant ones with regard to the reserve rule system, as such.

Having signed such a document, he becomes property, his contract can be assigned and reassigned, he can be optioned to play in other leagues with other teams, he can be sold, he can be traded. His alternatives in general are down to one. He may accept what is done or he may find another way to make a livelihood.

Q. Can you explain to the Court how the various contract provisions that we have read into the record and the rules that have been introduced in evidence operate in actual practice with respect to this system? A. Well, I would start—

Q. And please tell us what you are referring to to refresh your recollection in this respect. A. I have before me the basic agreement between the Major League Baseball Players Association and the clubs.

[151] Contained in that agreement is a copy of the Uniform Player's Contract, and I also have some notes of my own next to certain paragraphs.

Q. You have also access to the rules themselves? A. Yes.

Q. And are those present with you to refresh your recollection or would you like them before you?

Mr. Goldberg: If your Honor will bear with me, these rules are in evidence.

The Court: Certainly.

Mr. Kramer: May the record show the witness has just been handed Plaintiff's Exhibit 6?

The Court: Yes, indeed.

Q. Would you proceed then and the question is how they operate in actual practice. A. I think basic to understanding this—

Q. Will you lift your voice so we can hear you? A. Basic to an understanding of this is Rule 3(a) in the Major League Rules.

Q. This is the document which Mr. Kramer just referred to? A. Yes.

Q. What was that, Exhibit 6?

Mr. Kramer: Yes, Exhibit 6.

A. Rule 3(a) basically provides—

[152] Q. Rule 3(a) of what? A. Of the Major League Rules, basically provides that all of the players' contracts, the Uniform Player's Contract, must be uniform, it must be in a single form.

The Court: These are the rules promulgated by your association; is that right?

The Witness: No, your Honor.

The Court: What rules are you talking about?

The Witness: Your Honor, the Major League Rules are rules adopted by the clubs.

The Court: Yes.

The Witness: Most of them exist and have existed long before there was a Players Association.

The Court: And that is what you are referring to now?

The Witness: Yes.

The Court: Very well.

Q. Would you refer to the pages so his Honor can follow it and counsel can follow it, too, please?

By the way, is this the 1970 edition that we are referring to? A. Yes, it is. Major League Rule 3(a) is found on page 512.

The Court: Thank you.

[153] A. Near the bottom.

Q. What page is that? A. 512, near the bottom. In essence, it provides that all players' contracts must be in uniform and it provides that no club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, except with the written approval of the Commissioner.

Q. May I interrupt you at this point. In your experience as the executive director of the association, do you have knowledge of the Commissioner ever approving a contract different from the uniform contract? A. No, I do not.

Q. Please go on. A. I would like to refer to the uniform player's contract itself. Unfortunately, this is not found in the Blue Book.

The Court: Exhibit 6?

The Witness: It is in Exhibit 6.

Q. Is it similar to the contract that Mr. Flood signed? A. It is identical.

Q. Identical? A. Except as to salary.

[154] Q. Salary? A. Right.

Q. So that is in evidence. Can you refer to that contract to help you in explaining its operation? We will head it up to you in just a minute. It has been received in evidence.

Mr. Kramer: It is Plaintiff's Exhibit 3, your Honor.

The Court: Thank you. Showing the witness Plaintiff's Exhibit 3.

Mr. Hughes: Your Honor, would you like a copy to follow?

The Court: No, thank you. Thank you very much, Mr. Hughes. I am going to enter a general objection on behalf of the public and the court with regard to these rules. The fine printing job is so tiny that it offers ample opportunity to complain and to say one needs perfect eyesight of a youth of 30 or 32, Mr. Flood, but anybody older than that would really have difficulty.

A. Paragraph 10—

The Court: Read slowly so I can follow you.

The Witness: All right.

A. (Resuming) Paragraph 10(a) of the Uniform Player's Contract is the one commonly referred to as the [155] reserve clause.

Q. Is this a term used in the trade of baseball? A. In a kind of shorthand way.

Q. The sport of baseball? A. In a kind of shorthand way. It actually is an option clause rather than a reserve clause. It provides that the club may tender a contract to a player on or before January 15th. For purposes of this discussion, it is the rest of that paragraph which is important. It provides that if there is no agreement between the player and his club by March 1st next succeeding that January 15th, then the club may unilaterally renew last year's contract simply by advising the player with a notice in writing within ten days of March 1st.

The club may place any salary figure it pleases in that contract renewal, except that it may not cut the player's salary by more than 20 per cent below the prior year.

Now, there is another rule which states that a player will not be allowed to play in a regular championship season unless he has signed a contract for the current year.

This means literally that a player not in agreement with the terms offered him receives a notice within ten days of March 1st advising him that he is again under [156] contract under a one-year renewal and if he wants to play he must put his signature to that document which, in effect, gives another renewal right for the following year to the club to do the same thing.

So that into perpetuity, as long as the club is interested in exercising this option, the player has no say whatsoever in terms of what conditions he plays under, always bearing in mind he has the one alternative: he may decide to find a different way to make a living.

Q. Now, does the contract that the player has signed have other provisions relating to the reserve system? A. Yes, sir.

Q. And, if so, how do they operate in actual practice? A. Paragraph 5 of the Uniform Player's Contract provides that the player agrees that while under contract and prior to expiration of the club's right to renew this contract he will not play baseball otherwise than for the club, except for certain post-season games.

Now, under this provision, once he has signed his first contract, as long as the club never lets its option renewal lapse, he may never play for any other club.

[157] Q. Now, before you leave that, you are talking now about a man who has signed one contract. A. Just one.

Q. Let us go back for a moment so we can all be clear, including counsel, about the man who has been drafted the first time, signed a contract and is subject to the second draft. If that man, a newcomer to baseball, does not sign the second contract tendered to him by the second club that drafted him, what is his alternative, actually the way it works? A. I am not certain. I believe that the same procedure would follow. That is, he could be subject to a third draft, but I am not certain.

Q. We will explore that later. Now, take the man who has signed his first contract and pursue it further. A. Paragraph 5 also impinges in terms of the player's ability to make a living. It does not just provide that he cannot play baseball, he cannot play any other sport. That is, he agrees in that paragraph that he will not engage in professional boxing or wrestling and that except with the written consent of the club he will not engage in any game or exhibition of football, basketball, hockey or other athletic sport.

Now, both of those provisions run further than the [158] season. That is, these prohibitions hold not only while he is under contract, but also when it is prior to expiration of the club's right to renew the contract. So that, let us say, having signed a contract in 1969, and the 1969 season is over, the interpretation given this is that as you get into 1970, if it is before March, for example, these prohibitions, it is said, hold.

Q. By whom? A. Well, we have had an arbitration decision by the Commissioner which has said that in the case of a player who was fined for playing basketball in the winter, and the clubs argued that this provision meant that this was an absolute prohibition, he did not get permission of the club, and even though his contract for that season was over, the club's right to renew the option had not yet expired, and therefore the prohibition held, and the arbitrator, in the form of the Commissioner, the former Commissioner, upheld the clubs.

Q. Now, you referred to Section 6 of the contract. Is this related to any of the rules as they operate? A. Paragraph 6 provides that the player agrees that this contract may be assigned by the club and reassigned by any assignee club to any other club in accordance with the major league rules and the professional baseball rules.

I apologize for the long-winded answer. The answer [159] is yes, there are a whole series of rules in the major league rule and the professional baseball rules dealing with the assignment of contracts.

Q. Do you recall which rules specifically relate to this? A. No, I don't.

Q. Would I refresh your recollection by pointing to Rules 8 and 9? And I am referring to the Major League and Professional Baseball Rules. A. I have it in front of me. These are some of the rules dealing with the assignment of player contracts. They are not the complete rules.

Q. Now in looking at the rules, and again in operation of the rules, do they require the consent of the player to an assignment of his contract except for Rule 9F which deals with veterans? A. No, they do not.

Q. And are you familiar, do you recall 9F? A. Yes.

Q. Applying to veterans? A. Yes.

Q. And how does that operate? A. 9F provides that once a player has eight years of major league service—

[160] Q. A veteran, is that correct? A. A veteran, he is called a veteran—he may not be optioned to a minor league without his permission.

Q. He may be optioned to a major league but not a minor league? A. Well, the word "optioned" is not used between Major League Clubs. His contract may be traded or sold. He may not be optioned between Major League Clubs.

Q. Now, there are other rules which relate to the subject which operate in connection with the so-called reserve system.

Can you, for example, look to Major League Rule 2 and tell us how that operates according to your best recollection? A. Major League Rule 2 deals with a number of subjects. I think the most relevant one, the relevant part of it has to do with the establishment of so-called player limits; the maximum number of players that a team may reserve, the maximum number of players that there may be on the active roster for particular periods during the season, and there are comparable rules dealing with player limits for minor league clubs in another document.

Q. While you have the rules before you, you may help my recollection. Is their language in that rule referring [161] to who has title to the player? A. Yes. That is the way it is described. It starts by saying, "Since the supply of skilled players is not equal to the demand, the Major League Clubs shall not have title to more than 40 player contracts," and then there are certain exceptions indicated.

Q. Now, directing your attention to Rule 4A, how does that operate? In each case I want to know, for the edification of the Court and all of us, how it actually works. A. Rule 4A deals with, as its heading indicates, contracts with new players. It really sets forth—

Q. Are we referring to the same rule? I am referring to the professional baseball rules, because there are several.

Mr. Hughes: May I suggest that there may be confusion. There is a Rule 4 and there is a Rule 4A.

Mr. Goldberg: Which is the next one.

Mr. Hughes: Is that the one?

Mr. Goldberg: Yes, that's the one.

Mr. Kramer: Page 525.

A. Rule 4A of the Major League Rules deals with the reserve lists. Basically, in the case of a major league club, each club is allowed to reserve title to no more than 40 players. The reserve list is that list of named players. Those lists are circulated among the clubs and no club may [162] deal with a player that is not on its own reserve list, no player may deal with a club on whose reserve list he is not, either concerning present employment or prospective employment at any time.

Q. Mr. Hughes referred to the tampering rule, which I take it is Rule 3G. Would you refer to that rule and describe to the Court tampering means and how it operates in actual practice? A. Well, the most obvious type of tampering would be a violation of the rule I just indicated. That is, a player not on the reserve list of a club is approached by or approaches that club to discuss with him possible employment, either present or prospective, and that would be considered tampering. It is subject to penalties which are fixed in various ways.

The Court: Well, subject to penalties would be enough for our present purposes.

Mr. Goldberg: Yes.

The Court: Next question.

Mr. Hughes: Your Honor, may we have the answer to that question be read?

The Court: Surely. Would you read it, please, Mr. Court Reporter.

(Answer read.)

[163] Q. Now, would you explain again, from your experience and knowledge of the practice, how is this system, this reserve system collated from the various provisions enforced? A. Well, a player who would violate the no tampering rule, to put it bluntly, would be blacklisted. To my knowledge, there have not been recent cases. I guess the most recent case—I am not sure it is quite in point—but those players who really left the reservation, that is,

during the middle 1940s, who went to Mexico, even though they were on the reserve list of clubs here and who played in Mexico, some were blacklisted; at least one ended up in a court case.

Q. What is the meaning of a term which I understand is used in baseball of a restricted list and a disqualified list? Are those terms which are commonly employed? A. There are specific lists known as the restricted list and a disqualified list. A player who fails to report can be and is placed on the restricted list. A player who violates his reservation can be and is placed on the disqualified list.

Q. And what does this mean? A. It means that he cannot play for any club in organized ball.

Q. Major leagues and minor leagues? A. And Japan.

[164] Q. Are they part of the organized player system? A. Yes, sir.

Mr. Goldberg: I didn't realize, your Honor, that internationalism had flourished that far.

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[166] Q. Now, in your opinion, Mr. Miller, what is your own view, based upon your own expertise in the area, of how the reserve system operates today to affect baseball players and their profession? A. In my own opinion I think it is unnecessarily and unduly restrictive. I do not believe that you can operate without rules. It is quite clear that you need rules and you need rules relating to the contracting of players with employer clubs, but I do believe that the set of very tight restrictive provisions which currently exist are unnecessary, can be modified in a manner that would preserve the interest of the club owners, the players and the fans.

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[179] Q. You have negotiated with, as Mr. Hughes has indicated, the major league team owners on behalf of the Major League Players Association for several years now. What currently, putting past history aside, has been their

response to alternatives for modifications to the reserve system? A. Their response has been completely negative. We have not to this day heard a single counter proposal or a proposal for any modification whatsoever in any of the various ramifications and rules that make up the reserve rule system. The response we have received I think it is accurate to say can be condensed as follows: The owners' representatives have advised us that they like the system the way it is and they do not feel that they want to change it.

Q. Now, Mr. Hughes also inquired about the pendency of this lawsuit with respect to these negotiations. As one who has been in charge of the negotiations for the players, in your view does the pendency of this lawsuit prevent the negotiation of modifications of the reserve system? A. No.

[180] Q. Now, you, I take it, as executive director of the Players Association, have negotiated the pension plan for Major League Ball Players? A. Yes.

Q. Under the terms of that plan, is the fact that Mr. Flood is not playing this year affecting his pension rights? A. Yes.

Q. In what respect? A. The plan, first of all, covers more than what is commonly known as a pension plan. It is called a benefit plan, and it consists of retirement benefits, which had widoes' benefits, life insurance and health care coverage, among other things. By not playing, Mr. Flood, in the case of retirement benefits, is losing twenty dollars a month per year of service starting at age 50 for the rest of his life.

Q. Mr. Hughes also referred to conversations between you and Mr. Flood prior to his bringing of the lawsuit. Can you tell the Court when and where and what these conversations were about? A. The first conversation with Mr. Flood was very close to the end of November. It was at the Summit Hotel here in New York City. Present were Mr. Flood, Mr. Zerman, [181] his counsel from St. Louis, Mr. Moss, my counsel, myself and I think a gentleman

whose name escapes me, a business adviser of Mr. Flood, from St. Louis.

Q. And now would you relate the substance of these conversations as best you can recall it? A. Yes. Mr. Flood opened the conversation by advising that he had made a decision that he was going to file a lawsuit alleging that the reserve rule system was illegal and that he had made that decision and would shortly put it into play.

We spent, I think probably the next two hours, discussing this and the substance of what—

Q. What did you say? A. ——of what I said was as follows: I said that I thought it was a most serious step to take. I thought that the risks for him were great. I tried to learn from him how much he had thought the problem through.

Q. This is what you said to him? A. Yes, sir. I asked him if he realized that a case of this type most likely would take several years because it was highly unlikely that it would finally be decided until it reached the Supreme Court. I pointed out to him that in addition no matter how much merit there was in his case no one could give him assurance as to how it would [182] turn out.

I asked him if he understood that at his age, which he told me—he was approaching 32 at the time—that not to play for a year or two could well mean that he would never play again, that it was therefore possible to win the case but never play.

I asked him if he understood that if he had any ambition in terms of a front office job for baseball management, that he would have to forget it because the odds were that he would be blacklisted from such a job for such an action. In short, I presented every negative reason I could think of, and when I got through Mr. Flood advised me that I had not told him anything that he hadn't thought of before.

Nevertheless, I asked him to return to St. Louis and at least think about the whole problem again before he took action. That was the end of that conversation.

Q. Now, Mr. Hughes has also talked as to the financing of this litigation. Would you explain to his Honor how you make arrangements of this type and with whom you consulted about it? A. I consulted with the policy-making group of the Players Association, the executive board, the elected player representatives from each club. At a meeting in [183] San Juan, Puerto Rico, in mid-December, Mr. Flood attended part of that meeting, explained his position to the executive board, subjected himself to questions for an extended period from the executive board, and after he retired from that meeting the executive board made several decisions.

One was that they would support Mr. Flood's case; (2), that they would assist him in his legal expenses; (3), that all bills for legal expenses would have to be approved by the executive board before any could be paid out and that is the existing arrangement covering Mr. Flood's legal expenses.

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Jack R. Robinson

[197] Direct-Examination by Mr. Goldberg

Q. Now, Mr. Robinson, as a professional player of long duration in baseball, did you study the reserve system which operated in organized baseball? A. Yes, sir. I have studied the reserve system for a long time.

Q. And based upon your experience as a ballplayer who himself was under the reserve system and your study of the reserve system, do you have an opinion on how the reserve clause affects a ballplayer in organized baseball? A. Yes, sir, I do.

[198] Q. And would you state, what is your opinion? A. Well, my opinion, sir, is that anything that is one-sided in this country is wrong, and I think the reserve clause is a one-sided thing in favor of the owners, and I think it certainly should at least be modified to give a player an op-

portunity to have some control over his destiny. Whenever you have one-sided systems, in my view, it leads to serious, serious problems, and I think that unless there is a change in the reserve clause that it is going to lead to a serious strike in terms of the ballplayers. I think that they are pretty well fed up with the fact that they now no longer can even elect the team that they want to play for, to start.

As I understand it, the free-agent draft now says to the player, "You have to go to a particular ball club," and you don't even have a choice there, and I sincerely believe that the reserve clause is so one-sided in favor of the owners that the players don't really have control over their own destinies.

Q. Now, in your experience as a ballplayer, did you observe the operation of the reserve clause in the system which operates with respect to the question of whether a player can play or sits on the bench? A. Yes, sir.

[199] The Court: "Yes, sir," that is the answer.

Next question.

Q. And would you relate to his Honor and to all of us specifically how you observed the reserve clause operating in relation to the question of a ballplayer playing actively or sitting on the bench?

The Court: Now you can go forward, as long as it is apropos to the question.

The Witness: Yes, sir.

A. Well, the way I see it, the reserve clause does not affect the $90,000 ballplayer as much as it affects that guy who sits upon the bench.

Q. In what way? A. Well, he is a reserve generally, and he has to sit there to wait until a regular becomes injured or something before he gets a chance to display his abilities. Therefore, as long as he is sitting there on that bench his salary has got to remain, in my opinion, basically what it is because he has no real value, or they can't express his value by the way that he performs, and when that player does become injured and he replaces him, in my opinion

the strain affects his ability anyway because he now has to prove to his manager, prove to the public that he is a major league ballplayer and it sometimes adds stress to his playing ability, and there- [200] fore it hurts his opportunity of becoming more proficient and a better ballplayer, therefore commanding more money.

Q. Can you illustrate by examples within your knowledge ballplayers who were subject to this type of considerations to which you have now adverted? A. Yes, sir. I think we can take on our ball club—we had a pretty good team; we won six championships in ten years, and we had fellows like Don Zimmer, before he was injured, I think could have been an extremely good player on another ball club, but being behind Pee Wee Reese he had very little chance of playing. And Eddie Miksis, for instance, was finally traded, but he sat behind me. And there were others on different ball clubs around, the same kind of thing, but these are the kind of guys that stand out in my mind. A Don Hoak coming up had to sit on the bench two or three years when I was there because Don couldn't push me off third base finally, therefore it hurt his chances for a few years to become a better ballplayer, to become a person to make more money in the game.

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[216] Q. I understood you to say on your direct examination that you favored changes in what I thought you described as the reserve clause. Is that the expression you used, "The reserve clause"? A. I don't know whether that is or not, sir.

Q. The reason I ask it, Mr. Robinson, is that there [217] has been used here the term "reserve clause" and there has also been used here the term "reserve system."

And when you used, as I think you used, the expression "reserve clause" in your direct examination, were you referring to the Uniform Player's Contract? A. I was referring to the reserve clause as I understand it.

Q. Tell me what you understand the reserve clause to be. A. It means to me that a player is tied to a ball club for life. That's all it means to me.

Q. Do I understand, however you interpret the expression "reserve clause" or "reserve system," that your testimony is that you favor modifications of that system? Is that right? A. That is correct, I do.

Q. You don't favor the destruction of the system, do you? A. No, sir.

Q. And you never have favored the destruction of the system? A. No, sir.

Q. And wouldn't you really recognize that there has to be some kind of a system for baseball to operate [218] satisfactorily? A. Yes.

Q. And your point simply is that there can, in your judgment, be changes that would improve it from the players' standpoint, isn't that the sum and substance of your testimony? A. Yes, sir.

Q. And you go no further than that; you don't advocate abolishing the whole system? A. No, sir, I do not.

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[219] Cross Examination by Mr. Hughes:

Q. As I understand it, you favor some period of time during which a player is tied to the ball club for which he is playing? A. That's right.

Q. And you say there should come a time when he would have some liberty to change? A. Yes, sir.

Q. But you don't go beyond that, that is, you don't advocate that he should be free to come and go as he pleases at any time he pleases at any time in his career, is that right? A. That's right.

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[221] Redirect Examination by Mr. Goldberg:

Q. Mr. Robinson, in your opinion, what type of modification would accommodate the needs of the clubs and the

players in a reserve system? A. Well, in my opinion, sir, after a certain number of years with a ball club this individual could say to the owners, "You know, I have a chance to do such and such a thing to improve my condition." Then he should have that chance after a certain number of years. I think the owners would also have to recognize that since they have [222] all of the control, even if there was no reserve clause there wouldn't be any problems, they have to give the players a chance to speak up. It takes a tremendous amount of courage for any individual—and that's why I admire Mr. Flood so much for what he is doing—to stand up against something that is appalling to him, and I think that they ought to give a player the chance to be able to be a man in situations like this, and I don't believe this is what has happened. Give the players the opportunity to be able to say to themselves, "I have a certain value and I can place it on myself."

And if this particular club wants to meet that value, then they ought to have a chance to do so first, they should have first options, in my view. But I think one of the things that happens, very frankly is, if after twelve years with a ball club an arbitrary decision is made, "You go where I want you to go regardless of whether you like it or not," it is not my way of bringing harmony in any kind of a business, and I think if they gave him that chance it would help in this particular area.

Mr. Goldberg: That you very much.

The Court: Mr. Kramer.

Mr. Kramer: No questions.

Mr. Hughes: No questions.

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Henry Greenberg

[224] Direct Examination by Mr. Goldberg:

Q. And when did you enter baseball? A. 1930.

Q. How old were you at that time? A. Eighteen.

Q. And with what team did you first sign a contract? A. Signed a contract with Detroit Tigers.

Q. And when you did, did you immediately enter the major league or did you play in the minors? [225] A. Played in the minor leagues for three seasons under contract with Detroit. I was optioned out each year.

Q. And then you entered with the major league in what year? A. Came up as a regular in 1933.

Q. And you played with the Tigers through what period of time? A. From 1933 through the 1946 season, with the exception of four and a half years in the military service.

Q. During this period of playing with the Tigers, did you win any awards in baseball? A. One or two, sir.

Q. And during your whole major league career, how many did you win? A. Well, awards, I think I was voted Most Valuable Player twice, and I guess that's it.

Q. You also had some proficiency in batting, did you not? A. Yes, I think I did. I hit .313 in my major league career.

Q. And at various points did you not lead the league in batting? A. I never led the league in batting, but I did lead the league in runs batted in a number of times, home runs, [226] a number of times and doubles.

Q. After you played with the Tigers, Mr. Greenberg, did you play with any other major league teams? A. I played one season with the Pittsburgh Pirates in 1947.

Q. And was that at the end of the '46 season, do you recall? A. I beg your pardon?

Q. Was that at the end of the '46 season? A. End of the '46—

Q. That you went to Pittsburgh, that you were traded A. I went to Pittsburgh at the conclusion of the '46 season. It was in the winter of 1946.

Q. What were the circumstances under which you left the Tigers and went to Pittsburgh? A. Well, I was notified by telegram that my contract had been assigned to the Pittsburgh Baseball Club in the National League.

Q. Was that the only notification you received? A. Yes, sir.

Q. And you played for Pittsburgh, then, in what, the '47 season? A. One season, yes, sir.

Q. Would you tell his Honor what your salary had been [227] with Detroit in '46 prior to your trade to Pittsburgh? A. I received a contract for $75,000 in 1946 and a contract for 100,000 in 1947 with Pittsburgh. It was paid not outright, but it was paid; that was the amount of money I received.

Q. And would you also advise his Honor why it was that you left the Pittsburgh team? A. Well, I left the Pittsburgh team because of a number of reasons. One is that I was nearing the end of my playing career, and the other was that I had spent most of my career, in fact, my entire career in the American League, and then going to a strange league it was a little difficult to adjust, and for those reasons I decided that my playing career was over and decided to leave as an active player.

Q. Did Pittsburgh offer you a renewal of your agreement when you decided to leave them? A. Yes, sir, they did.

Q. And in your experience as a baseball player, are you familiar with ballplayers who continued to play after the age that you were at at the time that you left the Pittsburgh team? A. Yes, sir, there are a number of players that have continued to play on into their forties; not too many, but there are a few.

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[229] Q. Now, after leaving baseball as a player, you had other experiences with baseball in other capacities? A. Yes, sir, I did.

Q. Would you tell his Honor what capacities and for which teams. A. In 1948 I joined the Cleveland Indians as a vice-president. 1949 I was appointed as the farm director of the Cleveland Baseball Club. In 1950 I was appointed general manager of the Cleveland Baseball Club. In 1955 I

became part owner, vice-president, director of the Cleveland Baseball Club.

In 1958 I left the Cleveland Baseball Club and sold my stock back to the Cleveland Club. In 1959 I became part owner, vice-president and treasurer of the Chicago White Sox Baseball Club.

1961 I sold my interest in the Chicago White Sox [230] Club, stayed on as a general manager through '61. In 1963 I left the club. I had been the vice-president of the White Sox '62, '63.

Q. In your experience, then, as a player and as one who has been part of management and ownership of clubs in baseball, do you have an opinion as to the reserve system of baseball and the manner in which it operates?

The Court: Do you have an opinion? Yes or no.

A. I have a personal opinion, yes.

The Court: Yes.

Q. And will you now state what your opinion is? A. Well, I have been out of baseball since 1963, and reviewing the game, I still retain my interest as a fan, and I still have a great affection for the game, and my testimony is not in any way intended to be detrimental to baseball. In fact, the purpose of my being here—there are a number of reasons; one is that I feel that the reserve clause as it is constituted now and has been is obsolte and antiquated. And I think that the game definitely needs a change in the contract, and that it would help cement relationships between the owners and the players and provide a better image for the baseball public so that the game could continue to flourish and prosper, and I believe that this reserve clause that has been in the news since 1923, when the Supreme Court ruled [231] that they had to have a reserve clause, for years while I was owner, we had a number of instances when players would object to the reserve clause, and we constantly had to try to get Congress not to pass it, and it seems to me that the times have changed and that the owners and the ballplayers are going to have to

get together and work more harmoniously and with a more cooperative spirit so that the game can go forward, and the first step or the last step is the reserve clause in the contract, and certainly other businesses seem to be making headway, such as basketball and football, without a reserve clause, and I see no reason why baseball shouldn't be able to function and even function better without the present contract as it exists today with a reserve clause.

[232] The Court: Will you suffer an interruption, Justice Goldberg?

Mr. Goldberg: Surely.

The Court: (To the witness) I followed you. Every word of testimony is meaningful.

I have to pass on it, eventually. Now, I appreciate the significance of your remarks, but you must recognize that I do not at all have the familiarity with the involvements and the details of operation that you possess, so you must tell me a little more exactly what is there about the reserve clause itself that you regard as not to the best interests of the game. What in particular is there?

You take it for granted that I understand all of that. I don't. Tell it to me. Make it clear to me. What is there about that reserve clause that you think is not in the best interests of the game and particularly the players?

The Witness: Well, speaking as a ballplayer—and I am basically a ballplayer and for that ballplayers—

The Court: Yes.

The Witness:—it's a unilateral contract, Judge. The ballplayer has no choice other than accept the terms offered to him, because he can't play elsewhere.

We who grew up under those conditions as ball- [233] players in the '30s—this is the way the game was, and in those days we were eager to find employment and to play baseball. And no matter where they sent you and regardless of what the salary was, you went, and some players played for a couple of hundred dollars a month, and the seasons were four months long.

But conditions have changed since then, and the labor laws have changed since then, and I see this confrontation between the players and the owners. If it's not one thing, it's another, and it's been growing since the pension plan started. I was the original member of the pension plan, when I represented the owners, back in 194—well, in '46 I represented the Detroit club as a player representative, and then—when they had difficulty then between the owners and the players, I was general manager of Cleveland, and I represented the owners, and I could see then this friction that exists between the players and the owners, and having been a ballplayer and having been a general manager, I would recognize both sides, the problems on both sides, and I tried to get the owners to understand the ballplayers' point of view, and unfortunately they are not in a position to be able to do so because they had never been ballplayers, and they look at a ballplayer and his services in a different light.

Fortunately, the player representatives in the [234] American League, my good friend Fred Hutcheson, I could talk to him man-to-man, even though I was representing management, and Ralph Kiner, who was a representative in the National League, was a personal friend, so I could discuss with them the problems of the owners and the players, and they knew that in talking to them I was talking as a friend, and I was not necessarily selling the ballplayers out. I was trying to represent them in a fair way.

And this has been growing, and so since I left baseball we now have a baseball players' association that grew up only because there was this meeting of the minds, that had never been there, and the owners have an attitude which I am very familiar with because I spent fifteen years in meetings with both leagues, and I know their attitude; I know how they feel about ballplayers, and I think they don't quite understand how the ballplayer feels.

Now to be specific, in connection with your question Judge, it's very difficult for the average ballplayer to dis-

cuss contract, knowing that he can't go any other place, and you must remember that most of these ballplayers are very young and inexperienced, come from rural areas, and they aren't equipped to sit down with the owner, the business manager and discuss terms.

I, fortunately, had a little better success, having [235] been raised in New York and gone to school here, and then, having a little more ability than the average ballplayer, I was able to get better terms. I have never been—baseball has been awfully good to me. I have gotten wonderful salaries, and I have no objections to any of the treatment I have gotten. But I think the average ballplayer doesn't have that opportunity to represent himself.

The other thing that occurs to me—and it's applicable to the Flood case—I was with Detroit sixteen years, from the time I left school until I was notified by telegram that my contract had been transferred to Pittsburgh. Well, in sixteen years it seems that you have built up some kind of relationship with the club, that they can't just assign your contract arbitrarily on the waiver price, and then you have to go and play there. I think that baseball must recognize that, that the player has built up some equity in playing with the club over a period of years, that he has a family, has friends, has business associations in the city, and they can't just arbitrarily say, "You play in Philadelphia next season."

The Court: That is the kind of testimony I want you to give. I am not passing on the weight of it, but that is really the sort of thing I seek.

Now, is there anything else you want to say?

[236] The Witness: Well, those are the two things that come to mind, Judge.

The Court: All right.

The Witness: I think that those are the basic problems that exist. It's the fact that you can't negotiate your contract. But behind all this, as I—the reason for my being here, again, Judge, is that I think that this has to be

worked out between the owners and the players, and the game instead of standing still and saying, "We're No. 1; we're the best sport and the national pastime"—we've got to prove it, and other sports are doing better, and I'm basically a baseball man.

The Court: Next question?

Mr. Hughes: Your Honor—

The Court: Next question—I beg your pardon, Mr. Hughes.

Mr. Hughes: Your Honor, I think the reference to other sports ought to be stricken out. I think there was also an earlier reference to other sports.

The Witness: I'm sorry.

The Court: That is understandable. You see, we have rules here in the law, and Mr. Hughes' objection must be sustained, and I must direct that there be stricken from the record the testimony of this witness relating to any other [237] enterprise than baseball.

All right.

Mr. Hughes: Your Honor, I didn't want to interrupt Mr. Greenberg, but he made an earlier reference—

The Court: I say, at any time during the course of his testimony, any such reference is stricken.

Q. Mr. Greenberg, as one who has participated, as you have said, in both capacities—for clubs and as a ballplayer in your view, what accommodation could achieve the objective of safeguarding the interests of the players—as you have described their situation and expressed concern about the clubs also—and the clubs? Do you have your own opinion as to this? A. Well, my first feeling is that the reserve clause in the present contract should be eliminated entirely and basically to create a new image for baseball, because we have been—baseball has been always saying we need the reserve clause. It's always been the reserve clause. It's gone back as far as I can remember, even before I got into baseball, and there has been so much written about it, and I think that the public is confused about it. They have

the idea that the owners are just people primarily interested in profits, no concern for the players, which is not true.

I think the game needs a new image, and the first [238] way to get a new image is eliminate the reserve clause in the present contract, and then I think it would be very easy to come up with some kind of an agreement, a contract for a term of years in which the club had rights to protect its interests in the players during the development stages, and certainly if a club, after X number of years, five years—let's presume it would be five years—if it can't develop an esprit de corps between the players and the club, then the player ought to leave the club and go somewhere else.

It seems to me the club should have some time to protect their development costs in a player, and they ought to be able to in a period of five years to develop a spirit of belonging to a club, which is terribly important.

It's not just the money. A ballplayer likes to feel he belongs to something, and I think that once we get rid of this reserve clause, once that's out of the way and people forget it, why, I think it can be worked out very easily between the people who are in baseball and have the intelligence and ability to do it.

Mr. Goldberg: Thank you very much.

Cross Examination by Mr. Hughes:

Q. Mr. Greenberg, over the years as a player, did you get along with the Detroit management? A. Yes, sir.

[239] Q. And did you feel that as far as you personally were concerned, you were treated well? A. Yes, sir.

Q. And would that also be true of your year with the Pittsburgh Pirates? A. Yes, sir.

Mr. Goldberg: Would you talk up, Mr. Greenberg, because the court reporter has to get it.

Excuse me, Mr. Hughes.

Q. And as I understand the thrust of your testimony, it is not that you consider that the owners of the baseball

clubs treat their players poorly so much as you think there is a misunderstanding between the player attitude and the owner attitude; isn't that really the main thrust of your testimony? A. I think there is a lack of understanding between the players and the owners, and I think it's understandable, because there's so few players among the owners.

Q. Since you ceased to be a player, there has developed a players' association, has there not? A. I understand there has, sir.

Q. I mean, you are aware of its existence? You are aware of the existence—A. I'm not a member of it, sir.

[240] Q. I understand you are not, but you are aware of its existence? A. Yes, sir.

Q. And would you say that one of the functions of such an organization would be negotiation with the owners with reference to these very things that you are talking about? A. Well, I don't know who should do it.

Q. Somebody should do it? A. Someone should do it, and—

Q. You think it should be a matter of negotiation between parties acting in good faith towards one another? A. I certainly do. I think the players must recognize that they have responsibilities to the game as well as the owners, and that will come about when you do have this relationship between the owners and the players, in my opinion.

Cross Examination By Mr. Hughes:

Q. And you do have to have some kind of a system that will assure continuity of the game and attracting people from the business side, the financial side, to put the necessary money into the game, to finance it as a game? You recognize that, do you not? A. It would seem so; yes, sir.

Q. And you would feel that the game has to be so structured—whether you have specific views about it or [241] not, it has to be so structured that you have to be able to attract owners into a system which assures competiton to the field. Isn't that the primary object of the game? A. Well, I don't know what aspect you are discussing here.

From the standpoint of investing in the game, from a new owner?

Q. From the standpoint of investing in the game. A. Well, I don't think people go into the game as an investor because you have a reserve clause that was passed by the Supreme Court in 1923. I don't think that's any consideration. I think that the game—I would be perfectly willing to invest in baseball tomorrow if we had no reserve clause.

Q. And when you refer to the reserve clause, are you referring to that provision in the Uniform Player's Contract? A. Yes. Well—yes; I am.

Q. Now, Mr. Greenberg, in the latter part of your association with baseball, you were on the owner-management side of the table so to speak; is that right? A. Yes, sir.

Q. And are you familiar with the fact that the major league clubs do make investments in the minor league clubs and in player development generally? You are familiar with that? [242] A. Yes, sir.

Q. And you regard that as important and necessary to the game? A. I definitely do, sir.

Q. In other words, it is your feeling that you have to bring a player along, so to speak? He goes through a period of training and development; is that right? A. Yes, sir.

Q. And when he gets to the major leagues, would you say—and I am talking now generally, because there are certainly dramatic exceptions, including yourself—but when he gets to the major leagues, is there a period even when he is on the major league club when he is coming along and developing right on the club itself—the average player? A. Do I think what, sir? I didn't follow that.

Q. Do you say that even after he's gotten onto the major league club, there is a period of years necessary for him to come to the full development of his skills as a major league baseball player? A. In some cases that's correct, sir.

Q. Yes, and in some cases not, but in most cases is it not

correct? A. I wouldn't have statistics, but I would presume [243] that most young players that join major league clubs, it takes them a year or two before they can break into the line-up.

Q. But my question is, does it take them a year or two, perhaps longer, really to develop their full skills as a player? A. Well, the only way I could answer that is that it took me five years to develop my skills.

Q. And would you— A. I don't know how it would apply to other players. Some sooner, but—

Q. On an average, would you think it would take four or five years? A. I would think so; yes, sir.

Q. So it would really be a period of four or five years before the owner, who had developed the player, would be getting the full benefit of this player's playing skill; is that correct? A. Well, I don't know how you want me to answer that, sir.

Q. I want you to answer it yes.

The Court: Of course, you are not here to accommodate anybody.

Mr. Hughes: I realize that.

[244] The Court: What is your answer, under oath?

Mr. Hughes: Perhaps you would like the question again.

The Witness: Perhaps I don't fully understand it.

The Court: You will get the question, and see if it is clearer. If it isn't, Mr. Hughes will be delighted to reframe it.

Read the pending question, Mr. Reporter.

(Question read.)

A. In my particular case, Mr. Hughes, I played three years in the minor leagues and two years in the major leagues, and when I said it took five years for me to develop, I meant that at the end of the second year I was already an established ballplayer, and I played in the World Series. I was very fortunate in the second year, we were in the World Series.

But the average player, I couldnt' tell you that. I think it takes a definite period of time before a player develops, and the owners then could take advantage of his services.

Q. Without boast, would you say you came along faster than the average? A. I really wouldn't know that, Mr. Hughes. I really don't know.

Q. Now, is there a factor of team stability, that is, [245] in developing a team, that it does take time to develop a good team? A. Yes, sir.

Q. You take a good double-play combination, such as Mr. Robinson and Pee Wee Reese. It takes time to develop that kind of a combination, does it not? A. Definitely so.

Q. And would you say that team stability is a factor that should be taken into account in deciding whether and when and to what extent players can shift around from one club to another? A. I definitely think it takes time to develop a club, and the players get familiar with each other's abilities, and most of the clubs in the days when I played were players who had been together, the nucleus of the club were players who had been together for a reasonable length of time or even longer than that.

Q. It brings a stability, and it also improves the overall playing quality of the club if they play together? A. Yes, sir.

Q. Over the years? A. Yes, sir.

Q. And would you think it was desirable to have a system which would assure that they would play together at [246] least over a reasonable number of years, some reasonable number of years? A. I believe I answered that in saying yes; I do.

Q. Mr. Greenberg, I want to go back for a moment to your testimony with reference to the reserve clause in the player contract. I understood you to say that you would favor the elimination of that provision entirely; is that correct? A. Yes, sir.

Q. Well, does that mean that you would favor a system by which a player at the end of each playing year would be

free to play for some other club or any club he chose? A. Let me—the reason I said, eliminate it, rather than revise it was that there had been so much conversation about the reserve clause should be revised or changed. I think that the reserve clause, as everyone understands it—very few people do, unless you have been a ballplayer, and you have to get the definition of it—it's merely a clause in a uniform contract, one paragraph, which gives the club the right to retain the services of the player over a period of years, and I think that ought to be eliminated so that in the eyes of the public the reserve clause is eliminated.

Now, what you substitute for it to protect the [246a] owner's rights to the player is something that should be negotiated between the players and the owners that's satisfactory to both parties.

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[248] Q. And you think it is a subject matter of negotiation between the clubs and the Players Association? A. However it works out, whether it is the Players Association or players or how it works out. Whether the owners—I would prefer the owners of their own volition would change it themselves and say, "We recognize that times have changed and it's time for baseball to revise its contract and we think that maybe we can function under a new system," and do it themselves instead of having to take it to court or having to take it to the Players Association, and work it out that way. That is my personal opinion, and I think it can be done in many, many ways, and the game would continue to function and operate and the players would be probably more satisfied and I think it would be best for all interests concerned.

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[249] Redirect Examination By Mr. Goldberg:

Q. Mr. Greenberg, just one additional question. In your capacity as part of the ownership and management of professional baseball teams, are you familiar with the practice

of how development costs of a player are written off for tax purposes? A. Well, it is an expense. It is an expense. It is written off entirely during the season in which it is incurred, unless you have a contract with a player, as we did in the old days, three, four, five-year contract, 30,000 a year, and then you would write off the 30,000 that first year, thirty the next year until such time as you paid the player all he is entitled to.

Q. Absent a long term contract— A. Yes.

Q. —do I understand you to say it is written off within the year? A. That's right.

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[250] **Marvin J. Miller**

recalled.

The Court: Mr. Miller, it is my duty, no matter who the witness is, to say to a witness whose testimony is continued after a night has intervened that you are continuing with your testimony under oath. You understand that?

The Witness: I understand that.

The Court: Without the necessity of being resworn.

The Witness: I understand, your Honor.

Direct Examination By Mr. Topkis (continued):

Q. Mr. Miller, you recall your testimony of the ther day about the so-called free agent draft? A. Yes.

Q. On checking the transcript, it occurred to us [251] that it did not disclose in full detail how the so-called free agent draft works. Would you outline that to his Honor, please? A. The essence of the draft of players who have not yet entered organized professional baseball is that the various clubs agree on a procedure for selecting from these players. There are two drafts a year. The draft that takes place during the winter has an order of selection based on the standing of the various clubs at the end of the prior year, with the last place clubs obtaining the first selection.

I think the basic importance of it is this: No player entering into professional baseball for the first time can determine with which club he would like to play or even nego-

tiate. Instead he is told that a particular organization has selection rights to him. As a result, a new player or, for that matter, any player is faced with the problem of being in competition withother players, of course, whereas the club that he is negotiating with in theory has taken care of it in advance to see that there is no competition, because no other club may talk to that player while the first club still has selection rights to him.

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[255] Q. Now, you testified the other day as to certain discussions that you had had with representatives of organized baseball in connection with the reserve system. Did you discuss with the representatives any alternatives to today's reserve system? A. Yes.

Q. What alternatives were discussed? A. We have discussed a number, and perhaps the word "alternatives" is not proper, if I may explain. We have discussed a number of modifications which cannot be taken singly, but need to be considered perhaps in combination. They are not alternatives each in and of themselves to the present entire system. For example, we have suggested that instead of the club having an option on a player's services [256] for life, that that option be for an agreed upon period of years, such a period of years to be his years in organized ball, in major league ball, and preferably in a combination of both of those; that at the end of such agreed upon period that a player for the first time in his whole career be given an opportunity to establish what his market value is by being permitted to talk with and obtain bids from other clubs.

We have discussed the possibility that even when he establishes his market value and obtains bids from other clubs, that it might be possible to have a rule that his own club could still retain him, simply by matching the bid that he received and if the continuity of his employment with the club were that important, the club could obtain that continuity simply by matching the bid that the player had received.

We have suggested, really in response to an argument, that it would also be possible to prevent the so-called wealthiest club from garnering all the talent by establishing a system that is not perfect but obviously better than the present one and agree that no one club or two or three or four could sign more than X number of such free agents in any given period of time, thereby preventing any domination of all the talent by a club or a group of clubs.

We have suggested the possibility of getting at the [257] problem of the player of major league caliber, who as witnesses have testified, sit on the bench and who, in addition, quite often are optioned to the minors despite the fact that they are of major league caliber.

We have suggested the possibility of a salary progression, year by year, a minimum salary progression that would have as its purpose making it too expensive for a club to pay that kind of a salary and option the recipient to the minors or keep him on the bench and thereby encouraging moving him to a club where his talents could be utilized.

We have suggested the possibility of reserving less than the number of players now reserved. The number of players now reserved far exceeds the active roster. In a sport like hockey, the reservation is less than—

The Court: No, there you go. There you are stretching.

Mr. Hughes: Just a moment.

The Court: Don't do that. Stick to your knitting, that is your field.

All right.

A. It is possible, it is conceivable to have a maximum reservation list which is less than the active roster. We have discussed the possibility of competitive leagues. It is conceivable that in a free enterprise economy that the [258] competition between two separate leagues might be a very good thing for the sport as well as for the players and the owners.

We have suggested the possibility that in any period when the owners have control over the player's profes-

sional life, that there be a system for resolving impartially a legitimate salary dispute rather than have that salary named unilaterally by the club which controls the player's services.

We have, I believe, discussed a number of other possibilities, but I think these are the major ones that we have talked about.

The Court: Next question.

Q. Now, these alternatives to the present reserve system which you have been describing, were they proposed by you or by the representatives of the woners? A. They were proposed by—

The Court: No, just answer. That is simple, by you or by—

The Witness: I cannot answer it.

The Court: You cannot answer it. All right, go on.

A. They were proposed by the players.

Q. And what has been the owners' response to these proposals?

The Court: He did answer that. That is all I wanted [259] you to do, just answer it without any amplification.

The Witness: I'm sorry, your Honor.

The Court: Proposed by the players. All right.

Q. Was it your problem that you— A. You put it in the second person.

Q. You are Miller, the voice, but the proposers were the players? A. That's right.

Q. What did you hear from the voice of the owners? A. Throughout these discussions—and they have on and off now extended for a period of about three years—throughout these discussions we have never heard a positive response on these alternatives or other ideas. We have not heard any counter proposals or any suggested modifications whatsoever.

Q. Now, Mr. Miller, you described to the Court the other day the impact of the reserve clause on the players in various ways. Did you describe to the Court at that time, on

reading through your testimony, the full ambit of that impact or were there some matters that you did not touch upon? A. There were matters I did not touch upon.

Q. Would you lay those before the Court briefly now, if you would? [260] A. One of the matters I did not touch upon is the fact that when there is a completely tight control of a player's entire professional life it seems to just seep over into the question of how the player is handled as an employee; that is the question of whether ballplayers are able to proceed in dignity or not. And based on my experience and my knowledge of players and players' conditions, there have been too many occasions where this tight control of a player's life has manifested itself in control of a player's personal life.

Q. Would you describe to the Court the kind of control you have in mind? A. I mean the kinds of very direct pressures with respect to what a player may wear and how he shall dress and how long his hair shall be and whether he shall have a mustache or not. It extends to, in isolated instances, I am willing to state, but nevertheless disturbing instances of players being told with whom they may converse and according to the contract, even of what they may write, if they write during a season.

Q. You say with whom they converse. You are not referring to the bar on conversations with the representatives of organized gambling, are you? A. No, sir, I am not. I am talking about the situ- [261] ation this year of a player being threatened with a fine is he is seen talking with a female in a hotel lobby.

Q. Now, are ballplayers today typically married or unmarried, Mr. Miller? A. They are typically married.

Q. And does the reserve clause in its operation, or the reserve system, have any particular impact on players who are married and have families? A. Yes, it has a serious impact in this way:

The fact that a player's contract can be assigned and reassigned without notice to the player, and if it is during

the season, he is required to report within 72 hours, it has this type of impact: It is not just that he has to pick up and leave one city and go to another for his place of employment; he has the choice usually of separating himself from his family or moving the entire family, with all that that means. His community ties—and players typically today have many important community ties; they are part of the community in a very real way—it means, in the case of players who are somewhat older, that the plans that they had been developing for supporting families when their baseball life is over become disrupted because usually those plans are being made in the city where the player has been living and playing for may years.

[262] In the case of players with children—and this is the overwhelming majority of the married players—it quite often means a change of school for the children, and this should not be viewed as a single action, because typically when a player begins to be traded, he is traded quite repeatedly; sometimes more often than even once a year there are players traded two, three or four times in a year.

Q. Major league players? A. Major league players. It means in the case of trying to move at a moment's notice of suffering economic loss and difficulty, of trying to sell a house and buy a house perhaps in a tight money mortgage market situation, and none of these losses are taken into consideration. It has all of the typical difficulties that I think people know about, that is involved when you are forced to move suddenly.

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[277] Cross Examination By Mr. Hadden:

Q. Mr. Miller, there has been reference in the testimony here to the contention that young players, players [278] in general, occupy a position of disproportionate bargaining ability in reference to salary negotiations.

Is it not a fact, Mr. Miller, that in the course of the current negotiations with respect to the amendment of the basic agreement, it has been tentatively agreed upon be-

tween the clubs and the Players Association that the players, each player, will have a right to have a representative of his choice accompany tim in his salary negotiations? A. Yes, that provision, though, Mr. Hadden—

Q. Is the answer yes, Mr. Miller, or no? A. I am sorry, because you introduced it by saying with respect to new players. That provision only refers to major league players, not new players coming into baseball.

Q. If I referred to players coming into baseball it was an error on my part. A. Yes, you did.

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[281] Redirect Examination by Mr. Topkis:

Q. Mr. Miller, you have been taken point by point through various provisions of the contract, the agreement, and the regulations. Let me ask you a general question, if I may. Have you sought in your negotiations to make changes in the reserve system? A. Yes, for three years.

Q. Have you made the slightest progress? A. None.

Q. Have you made a variety of proposals? A. Yes.

Q. Have the owners made one proposal? A. No.

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Robert R. Nathan

[396] Direct Examination by Mr. Topkis:

Q. Let me ask you to contrast, if you will, in your own mind a situation in baseball where, as at present, the reserve system operates, with a hypothetical situation, where the restraint on the players moving from one team to another is less than the reserve system permits? Could you state to his Honor what you would expect to be the dif-
[397] ferent turnover rates in those two situations, that is, the different degrees with which players could move from one team to another?

Mr. Hughes: Your Honor, I object to that. I don't see how he could possibly give an opinion unless in the hypothesis put to him he has some idea of what these alternatives

are. Otherwise, it is just a blanket, vague alternative to the existing system.

The Court: As I observed yesterday, I think where the witness impresses the Court as being competent and the question seems somewhat uncertain, I will let the witness handle it. Let him tackle it first, and then we will deal with it after.

Do you remember the pending question, Dr. Nathan?

The Witness: Yes, your Honor.

The Court: Can you answer it?

The Witness: I believe so, sir.

A. To the extent that a system were less restrictive in the tying together of the employee with his employer, there would tend to be a larger turnover, subject again, however, to the degree to which the employer and the employee were able to negotiate effectively in relation to the value of the employee from the employer's point of view and also from the employee's point of view.

[398] To the extent that you had a freer system, by degree from the reserve system all the way down to where there was no restraint at all, you would tend to have more turnover, but only if they were not able somehow to reconcile their interests.

That is why, as I said before, it might not result in more turnover of employees to other employers, because it depends on how responsive the wage negotiations are and the wage settlements are to a wide range of circumstances.

[399] Q. What circumstances would you have in mind? A. Well, for instance, I have been thinking a lot about this in terms of one of the subjects that has always come up in the economic field as to the power or strength, economic strength of the employer, and we do know that in economics there are marginal responses, and by marginal responses I mean, sir, that if, for instance a top team were to have three outstanding players, the addition of a fourth player may be less advantageous to that team than the addition of the third player, and the addition of the third

outstanding player would tend to be less advantageous relatively than the addition of the second player, and that that fourth player being on a team which has three outstanding players, that addition of one player to a club that does not have an outstanding person may have more value than to the fourth, in that it probably does have three outstanding players, so that these marginal factors become very important.

Then there are other factors. For instance, you ask about mobility. We live in a society now where survival is not the problem of most of the people. We have been called an affluent society and as I travel—I came back from around the world two weeks ago, your Honor, and there are countries where our affluence is so great relative to what one sees abroad that we realize that what controls [400] and motivates us now is not entirely economic. Some people prefer to live in one part of the country than in another. Some people prefer certain communities because of the schools or the health conditions or the environmental circumstances rather than others, and these factors of a non-economic nature also enter into this consideration of whether an employer or an employee can arrive at a negotiation, and that is why when you ask me if there would be more turnover with no reserve system or with varying degrees away from the reserve system, I must say that one has to take into account many of these factors and the bargaining capabilities between the employer and the employee in view of these factors.

Q. And these are factors which an economist today takes into account when making economic forecasts? A. Without question. Otherwise it is purely abstract and has no reality in the world in which we live.

Q. Now, you spoke a moment ago of a situation in which a fourth outstanding player would be of less value to the team already having three outstanding players than he would have to a team having no outstanding players. A. This would tend to be the case, yes.

Q. And in that situation would you expect that the player would be employed by the team already having three outstanding players or would you expect the bidding to result [401] in his going to the team without any outstanding players? A. Given not too much difference in their overall capabilities or reasonable differences, I would certainly expect that after a team has a number of outstanding players and where the marginal increment or margin of value would be somewhat less, that he would tend to be employed by a team where they had no outstanding players.

Q. Now, were there less full restraint on a player's mobility than exists under the reserve system would you expect that the best players would tend to gravitate to the teams in a position to offer the highest wages by reason of their gate receipts or whatever other phenomena? A. I would not expect this without limitation. I don't think that —and I think I know considerable about many industries in this country, and we find that in industries where there is freedom between employer and employee we do not find that all the top designers go to General Motors and nobody to Ford or Chrysler, or all the top men's designers go to Hart, Schaffner & Marx or Botany 500 and nobody goes to others. We do find in our society, despite freedom of movement, that there is not a tendency for all of the top talent to aggregate in one particular location or with one particular entity.

The Court: You say all, but would that be true of a [402] substantial number of all?

The Witness: In a perfectly free environment these enterprises which have the capability immediate of paying more will tend to get more talent than those who haven't the capability to pay that much. That certainly is true.

The Court: All right.

The Witness: But, your Honor, we find—well, there is an old saying in economics that we move from shirt sleeve to shirt sleeve in three generations, and what that means is

that success tends to come to a firm or a family, but it doesn't last very long because others come in and pretty much displace them and new innovations, new entities arise, new capabilities emerge, and in a free system one finds that not many groups stay on top of the heap for very long.

A great playwright may write three or four plays and then some other playwright comes to the top, or a great musician happens to be the one who will sell several million recording records, but sooner or later someone with more talent, and usually sooner, emerges, and so what we tend to have in our society, in our free system, is not a gravitation of talent and ability into one entity where it tends to be frozen and be permanent, and I think to the extent our society permits, your Honor, freedom of movement among entities, [403] to that extent I think our society will find that diversity tends to result in not concentration over time. There will be exceptions but over time, your Honor, I think this tends to bring about a rather remarkable distribution of capabilities.

Q. Would it be accurate to say, then, that the plain money factor is, in your experience, studying the American economy, usually overbalanced by other factors in determining the top position? A. No. I think the money factor is still in our society the predominant factor in determining how resources are used and where they are located, but there are other factors where money itself does not control and where loyalties and interests do tend to modify the price, the market economy.

But the market economy, where the price is dominant, still is the most important factor in our society.

Q. Well, let me put the question in quite concrete terms, if I may, Mr. Nathan: Were there three or four clubs that, by reason of the population in the areas in which they had their teams, had the likelihood of drawing higher gate receipts, in a system without the reserve clause or with a less restraining system than the reserve clause, would you ex-

pect that those clubs would be able to win far more frequently than their less privileged brothers? A. I would say over time they would tend to win some- [404] what more frequently, but again I come back to the factors that prevailed before. The thing that impressed me the most, your Honor, in the Milwaukee Braves case was that here was a city of size and growth and vigor but certainly was not New York City, it wasn't Chicago, and as a matter of fact, it was close to Chicago and had competition from Chicago, and it wasn't the size of Boston or Philadelphia, where the attendance was phenomenal and where, by effort and, I think, outstanding leadership, they were able to acquire very substantial talent—and it is my recollection that in six or seven out of the thirteen years or seven or eight out of the thirteen years the Braves were in Milwaukee, I believe they finished first or second in the National League and had the top attendance of all of the 16 teams except one over that thirteen-year period, and here there was not a tendency for all the players to move.

Now, on the other hand, very frankly, we must look at the New York Yankees who, over the period of many years, had an outstanding attendance record, being in a big population center, and here there was a capability of acquiring a substantial number of players and holding onto them, but it is my conviction that in the interest of the owners and in the interest also of the public and the players that many techniques could be adopted which would preclude any [404a] strong tendency toward concentration of talent in the bigger cities, and I think this is entirely possible without the kind of a rigid restraint on labor-employer relations that now prevails.

[405] Q. You mentioned various possibilities. Could you indicate some to his Honor? A. Well, your Honor, for instance, if the teams were to divide the home game and field game receipts on a different basis, I understand now that about 80 per cent of the total home game receipts accrue to the home team and about 20 per cent to the visiting team.

If, for instance, those were distributed on a 60-40 basis, let us say, and one were really concerned about excess strength of the larger city teams relative to the smaller city teams, this would certainly bring about a smaller dispersion in economic strength between these teams and increase the capability of the smaller city teams to hire higher priced players. But even that would still yield, I am certain, very substantial differences that one can't anticipate in economic terms where many players hold great promise and don't turn out to be very outstanding, and others seems to hold great promise and turn out to be very disappointing.

But certainly if one were to be deeply disturbed more than I personally am as an economist about this matter of wealthy clubs in large cities, then the redistribution of the home game proceeds would be far more logical and far more compatible with our free enterprise system than this [406] rigidity imposed on a player for his lifetime.

Q. Are there any other alternatives that have occurred to you in your study of this field? A. Well, certainly the division of television and radio receipts is another one whereby the economic compatibility of the company could be more nearly equalized than it is at the present time.

As an economist, however, who believes in the free enterprise system, I do have grave doubts about such schemes, just as I have grave doubts about the reserve system.

I believe that we will find that even if we don't redistribute economic compatibility by size of city that if we will permit players to move more freely and reduce the rigidity of employee-employer relationship that we would find a considerable amount of competition and a considerable amount of varied strength and a considerable changing over time in the win-lose relationships of individual teams.

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[412] Q. If the present reserve system were eliminated and it were replaced by a system in which the only restraint permitted on employees moving from one team to

another were the right of the employer to sign employees to contracts for a term of years ranging up perhaps to five years, would you expect that the level of performance of the different clubs on the field in playing games would be significantly affected?

Mr. Hughes: I object to that question. I submit that Mr. Nathan, with all of his distinguished qualifications, is incapable of giving a meaningful answer to that question. It seems to me we are getting not into the area of an economist, but we are getting into the area of clairvoyance.

I respectfully object.

The Court: He has already testified that in his undertakings in his specialty he always has to reckon with the human factor, human limitations, human strength, and I take it that in answering a question such as now pends before you, you will take those factors into consideration.

The Witness: Yes, sir.

The Court: Objection overruled. You may answer.

A. As an economist I would expect that if the reserve system were eliminated and players could sign with [413] any employer, any team, with the only restriction being that the duration of contract be no more than five years, I believe that this woud tend to have some distributive effects—redistributive effects of players among teams. I believe that this would tend to raise the salaries of players, first, because they would then have the opportunity to bargain after their three-year contract or four-year contract, or maximum five-year contract.

I think that the econmic forces would tend to be freer in the decision of the player and the employer as to where he would go because he might be offered $10,000 more in another city, which he may or may not accept. He might not like to go to this other city and therefore he might prefer to take ten thousand less in one city where he is than ten thousand more in another city.

Nevertheless, the market place would then become a more important determinant. Given the facts of today,

there can be moves by selling of contracts or trading of players. It would be my judgment as an economist that the elimination of the reserve system and the substitution of a contract arrangement with a maximum period of five years would certainly be advantageous in the distribution of player talents among teams.

Q. And hence would tend to equalize competition [414] on the field? A. It would tend to make the teams' capabilities responsive to competition, not equalize competition, but tend to make the teams' capabilities responsive to what happens in their competition and negotiations for players.

I find the words "equalization of competition" somewhat —I have read it in some of the context in this field. In our society I don't believe we seek to pursue equalization of competition. I think we seek to pursue equalization of opportunity, and I think it is equalization of opportunity that tends to bring about vigorous competition and that is what would be desirable and I think this would enhance competition in this field.

Q. On the field? A. Yes.

Q. On the playing field? A. Well—

Mr. Kramer: I am not sure he answered that.

Mr. Hughes: There was a shrug of the witness's shoulders. It is a question whether it is competition on the field or in some other way. That was the question that was put to the witness five minutes ago.

A. Let me say in my judgment I would interpret this would enhance competition between the clubs.

[415] Q. In what areas? A. In the performance of this sport and therefore in the assembly of players and assembly of talents and in their competition with each other.

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[416] Cross Examination by Mr. Hoynes:

Q. Mr. Nathan, would you please tell me by whom you were engaged to make the testimony that you have given today and the investigation that you have revealed to us

today. A. I was engaged by the law firm which Justice Arthur Goldberg represents, and I was contacted by him and asked if I would be the economic witness in this case, and I consented in my discussion with him.

Q. When was that? When was your initial discussion with Justice Goldberg? A. Approximately two weeks ago.

Q. With whom have you consulted in preparing for today's testimony? A. I have consulted with Mr. Iverson in Washington and Mr.—Justice Goldberg by phone and with Mr. Topkis, and I think one other—two other lawyers and with Marvin Miller.

Q. Marvin Miller, the executive director of the Major League Baseball Players Association? A. That's correct, sir.

[417] Q. Will you tell me what source material you may have used in preparing your testimony, other than the conversations with the attorneys and Mr. Miller? A. Yes. I went back first and reviewed my own testimony in the Milwaukee Braves case. I read the report of the Celler Committee back in the mid-50's. I reviewed some literature, articles, especially one by a professor of the University of Chicago, Professor Rottenberg. I assembled some statistics on salaries and wages and wage changes over time by economic sectors and for various professions: doctors, dentists and lawyers and accountants.

All of these data, by the way, I did not use, I have not presented here. I have them readily available and will be happy to present them. I didn't, because I didn't have the comparable data for up to recent date for the baseball industry.

But that is, I believe, other than the testimony that I have read of some of the witnesses here, that's the extent of my research.

Q. Did you ever consult the baseball rules and contract provisions themselves? A. No; I did not. Only insofar as—

The Court: "No" is the answer.

The Witness: No, sir.

[418] The Court: All right. Next question?

Q. Have you ever been engaged or employed by a baseball team? A. No, sir.

Q. To perform any services? A. No, sir.

Q. Have you ever played baseball, Mr. Nathan? A. Just sandlot—amateur, when I was a child—youth.

Q. I take you didn't face the reserve clause then. A. No, sir.

Q. Are you a baseball fan? A. Yes, sir. Reasonably, one; yes, sir.

Q. Would you say—

The Court: You mean, under reasonable control?

The Witness: With reasonable limitation, your Honor, yes, sir.

Mr. Hoynes: May I note that Mr. Nathan's home is in the Washington, D.C. area. Most baseball fans in that area must keep a reasonable amount of restraint.

Mr. Kramer: Your Honor, my enthusiasm is unbounded.

Q. Are you at all familiar, Mr. Nathan, with the process by which the major league ballplayers negotiate their salaries with club officials? A. Not first-hand, no.

[419] Q. Have you spoken to any baseball players about their negotiations? A. No, sir.

Q. Have you spoken to any baseball general managers, assistant general managers or other club officials about the process of negotiating a baseball contract? A. No, sir.

Q. Are you aware of the existence and functions of the Major League Baseball Players' Association? A. Yes, sir.

Q. Do you know what if any impact the Association may have upon such matters as player compensation and the negotiation of player compensation? A. It is my understanding that they have no impact on individual player negotiations except for minimum levels and except for fringe benefits such as pensions and per diem allowances and things of that nature. But it is my understanding that it has no role in the individual negotiations of various levels of salaries achieved by different individual players.

Q. Mr. Nathan, you have excepted several items. Do you not think that those exceptions that you have mentioned are of considerable importance, that is to say, the minimum salary level, the other benefits, particularly the major [420] league baseball players' benefit plan? A. Very important, sir.

Q. Are you familiar with the benefit plan? A. Not in detail. I have heard some of the characteristics of the pension plan, for instance, but I have not studied it in detail.

Q. So you do not know the relationship or the importance to the player of the pension plan? You are not familiar with the precise details of it? A. That's correct, sir.

Q. Are you aware of any other areas of negotiation between the players' association and the major league clubs other than the fringe benefits, pensions and minimum salary, that may have a bearing upon the process of negotiation between the player and his club? A. No, sir.

Q. Would you be surprised to hear that the players' association has negotiated on behalf of the players on such matters as the maximum reduction that a player may incur in his salary in any year and has also negotiated on such matters as the representation in the process of individual negotiation of a player by an attorney, accountant or other agent? A. No. I would not be surprised at that.

[421] Q. Do you not think that those things that I have just mentioned have an impact upon the negotiating process, and might there not be many other, similar matters which the players' association could raise in collective bargaining which would have an impact upon that process of individual negotiation? A. Yes. I think that out of this organization and its relations with the employers and with the employees, it can have a significant impact in terms of the benefits and the salary levels in the negotiations between the employers and the employees.

Q. So that whatever imbalance you testified to earlier between the relative strengths as you would analyze it of the club and the player tend to be somewhat diminished—that is, the imbalance tends to be somewhat diminished by

the activities of the players' association? A. Yes, I would hesitate—I would immediately say that given the continuation of the reserve system, that diminution would still inevitably leave a very substantial gap between a system of employer-employee relations without the reserve system and one with the reserve system.

Q. You don't know that for a fact, that is to say, you are not sufficiently close to and familiar with this individual process of bargaining as you have stated before to be certain [422] that there would be a wide disparity, notwithstanding the efforts of the players' association? A. Well, when I used the word "difference," I meant a difference in the process of arriving at salaries, not necessarily the diminution of the salary from what it might be without the reserve clause system, or the reserve system, and what it would be with it. What I am saying is, the very bargaining process between employers and employees where a reserve system prevails and an employee has no alternative of employment within his vocation would make a substantial difference in the bargaining strength as compared with one where the reserve system does not exist.

Now, how large that impact is quantitatively, I'm not in a position to suggest or measure.

Q. One of the reasons why you are not in a position to suggest or measure the quantitative difference is because you are not actually familiar with the process? A. That's only one of the reasons. I could measure it if I had the data, and I think if I had the levels of pay and I had the distribution of pay and I had these data over periods of time and could draw analogies between wage negotiations and salary negotiations in reasonably related areas of activity, I think I could develop quantitative differences which would be meaningful and significant, [423] whether they are large or small.

Q. You have not, however, made such a study? A. That is correct, sir.

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[428] Q. You mentioned, in discussing your familiarity with baseball, that you had testified a few years ago in a case involving the transfer of the Milwaukee Braves' franchise to Atlanta.

Was your testimony in that case not limited almost entirely to demographic data concerning the Milwaukee area and to an economic analysis of the impact upon the Milwaukee area of the departure of the Braves? A. Those were two out of the three subjects that the study was concerned with. You are correct. One had to do with the demographic and economic characteristics of the area and the impact of the removal of the Braves, but there was a third that concerned itself with the economic operations of the Braves in relation to population, in relation to its standing in the league, in relation to the factors that were influencing community acceptance, such as, for instance, the latter stages of the stay of the Milwaukee Braves was characterized by a very substantial reduction in attendance, attributable to community management relations, so that we did get into some aspects of the operational side of the Milwaukee Braves in addition to the demography and the impact on the community.

Q. But you did not make any economic study of the [429] reserve clause and the relationships of the clubs and players? A. Not at all, sir.

Q. You stated that you would not necessarily expect the players, if they were free to choose their employer club, to gravitate, I think was your word, to the highest paying clubs, but that there were other factors which would influence the decision? A. That is right.

[430] Q. Would not the offer of significant salary increases be a predominant factor in that decision, however, if one were to look at the player group as a whole without focusing on one player who might have strong communities? A. Yes, I think that the salary level offer will be the most important single factor.

Q. Are you aware that among the 24 major league clubs

there is a wide disparity of financial support, economic base, both in terms of matters that you discussed, population and city, but also in terms of the individual financing of the club and the owner of the club? A. Yes, I know there is very considerable difference. I saw that in Washington where Bob Short took over, a man of very considerable means, and despite the fact that Washington is one-tenth the major market area of New York City and is near Baltimore, that he was able to attract Ted Williams, which was an important factor, and his resources I think will reveal themselves in the economic profitability.

By the way, I would like to emphasize, your Honor, that profitability is different from gross revenues, that sometimes you have clubs with very high gross revenues that aren't very profitable.

And basically, and I don't say this critically, [431] because I think it is the heart of the American system, it is the bottom line, what businessmen refer to sometimes roughly as the bottom line, the net, which is what determines whether businesses are successful or not, and that is true of baseball, too, because one is concerned with the expenditure side as well as the revenue side, and I do believe that we sometimes overlook this factor in judging whether the so-called big cities or the big market areas will overwhelmingly dominate the smaller ones, and this doesn't always happen.

Q. In terms of practicability to pay, to develop players, to pay players, there is a wide disparity among the range of the 24 major clubs? A. Certainly.

Q. You testified that the offer of salary is an important and indeed perhaps predominant factor in a player's determination as to where he will play. A. I believe it is.

Q. Is it not the inevitable conclusion, therefore, that the clubs with significantly greater resources will be likely to make significantly better offers to players and therefore achieve a team with considerably greater strength than the clubs who are more limited in their financial ability? [432]

A. Not necessarily. You have the capability today in terms of trades and buying contracts. If that were the only consideration, we would have today attractive offers to purchase players from teams who are in need of money or who are weak financially, and if this were the only consideration we would have today a tendency for the top players to gravitate to the one team. That is one factor, and we don't see it.

The second factor is I do believe we are not dealing with a fungible or an easily interchanged commodity. A ballplayer is not like a ton of carbon steal or a ton of nickel steel or a ton of another alloy, as we know classifications. There are changes in some ballplayers. They are desired in some places and not in others. While as an economist I can say I would agree with you without question that the salary level will tend to attract a player to where the salary offer is the highest, nonetheless we don't see under the purchase system, which provides this transferability, a tendency for all the good players to be in New York or Chicago.

Q. That tendency that you described as being potentially present with the trade system, that tendency would be, nevertheless, accentuated, accelerated greatly if the player were now the determining factor rather than the [433] club as to whether he would be transferred to another club? A. No, I don't agree with that, because I think that the owner of a club will be more money-responsive or money-conscious than a player. An owner of a club who is offered say a quarter a million dollars for the contract of a player will be inclined as a businessman, as an investor, to look at the monetary reward more exclusively than, in my judgment, would a player who has these other factors: A family, community relationships. So that I would frankly, as an economist, expect the opposite. I would expect that under the contract transferability that there would be more tendency for a concentration of players through the transferability in sale of contract than by the free negotiation.

Q. You haven't discussed this with any club owners or general managers, you do not know their actual views? A. I do not.

Q. Do you know how many players move from club to club for $250,000 or $300,000 prices? A. No. I know there are trades going on, I read them in the paper; but I have no statistics. I have no idea of how many sales at $250,000 or $300,000.

Q. Is it not true that almost all those trades are the assignment of player contracts for, in return, the [434] assignment of other player contracts and not the sale of a player contract for cash? A. Usually the trades are—I don't know how much the cash is, but often it involves the trade of players plus cash, but I am not knowledgeable on the specifics.

Q. There is no evidence that you are aware of to suggest that the club owners are in fact motivated by the money considerations that your economic analysis would lead you to believe? A. That is correct.

Q. You discussed the training programs that other industries in the United States and I suppose throughout the world engage in, and you mentioned the figure of three to nine months as being a typical time for training. Do you have any idea how long it takes to train a major league ballplayer? A. No, I really do not.

Q. Would you expect it to be in the three to nine month range? A. No. I would expect it to be longer.

Q. You would expect it to be considerably longer? A. Yes.

Q. If you are a retail establishment—you mentioned that as one of the kinds of businesses that trains employees—[435] and you are training 100 employees, how many of those employees would you expect to be capable of performing their assigned tasks at the end of a training period? A. I really don't know, but I am sure the percentage may be half. One tries to do a preselection. Although I happened to serve in an advisory capacity to a transit com-

pany, and I was shocked at how many people they bring in —how many they recruit for bus drivers and how many they drop even before the end of the training period, let alone the probation period. But I would think that you would expect, you know, a third or a half, a fairly substantial portion, to be eligible and available and suitable for employment.

Q. Do you have any idea what proportion of the players that enter baseball at the minor league level become regular performers at the major league level? A. I noted those figures, but I don't remember them. I am sure it is a very, very small percentage of those who enter pro ball that end up in the major leagues, very small.

Q. Much smaller than the results that you would find in a bank training program or a retail establishment training program? A. Yes, substantially.

[436] Q. And after a considerably longer period of time? A. Yes, sir.

Q. What proportion of the gross revenues of an industry, say the banking industry or retail establishments, what proportion would you expect of those kinds of businesses to spend on their employee training? A. I have never discussed it, but I am sure it is a very small percentage, possibly one or two per cent of their payroll, maybe three per cent, but it would vary by industry and duration and what kind of training, what kind of recruitment they undertake, but it is a relatively limited percentage.

Q. If I told you that approximately 25 per cent of gross baseball revenues are invested in training of young players, would you consider that to be a significant difference between the training expenses of baseball and the training expenses of these other callings which you described? A. Yes, I think that would be significantly different.

Q. So that in baseball there is a considerably greater investment, if you will, in the training program than the typical industrial case with which you are familiar? [437] A. In total baseball, yes.

Q. You also mentioned that although other industries do invest large amounts in training, although we have seen it is not nearly as much of their gross revenues as baseball, that they invariably expect to lose to some of their competitors some of the products of their training system? A. That is correct, they do.

Q. Is it not true that in the military and in many branches of government service and, indeed, increasingly in private industry significance, additional training that might be measured in months and even perhaps in years, is conditioned upon employment pledges or the signing of employment contracts by the prospective trainee? A. Not to my knowledge.

Q. You are not aware of any such contracts or arrangements? A. No, sir.

Q. In answer to a hypothetical question posed by Mr. Topkis, you discussed the effects of adopting long term contract arrangements with players, Did you consider the practicability of adopting long term contracts from the club financial point of view and considering the useful life of a baseball player and the uncertainties of continued high performance of a ballplayer? [438] A. Well, yes, I did. I am assuming that if a club gives a five-year contract to a player who breaks his arm in a way that he can't continue to play that there would be a provision in the contract that beyond certain accident or employment compensation provisions and health provisions in the contract that they would not be required to pay him for the whole five years if his capability is terminated. It would induce some added risk on the part of a club, but I don't think that one can say that a five-year contract at a given amount or an increasing amount would commit the club for that full amount irrespective of what develops.

Q. So that is a qualification to the five-year concept that you were discussing? A. Yes.

Q. Would a player who is working under a five-year contract be likely to have the same incentive to improve his

skills and performance as a player who is in a position to negotiate his contract again at the end of every season? A. In my judgment, he would have more incentive, because when he is working with one company—with one team and he knows that unless that team sells him he is always going to be with that team, I think how much more he can make out of that team is limited by how successful [439] he is in negotiating with his manager, but if he knows two years hence or three years hence or four years hence he is really a free agent and he is going to be able to go out on that market and be an openly competitive product or has an openly competitive service, in my judgment the inducement for his achieving outstanding fame and reputation would be even enhanced by that.

Q. So that you suggest that he would have a greater incentive to improve his individual record so that his ability to bargain would be enhanced? A. I think so.

Q. Is there not some tension between a major league baseball player's desire to improve his individual record and the qualities of team play that produce a winning team, that is to say, a player sometimes must try to hit behind the runner, he is going to be out, his batting average is going to suffer, but the runner is advanced to a scoring position; is there not some inconsistencies between the desire to increase your own individual standing so that you will have a greater bargaining power with strange clubs which care not whether you advanced a runner the year before? A. No, I don't believe so. I think if a club is going to hire or employ someone who has been with another [440] club, I think they are going to very much take into account that employee's personality and character and teamwork and team cooperation, because no entrepreneur, whatever business he runs, likes to bring into his firm someone who is going to destroy morale.

From an economic point of view, one has to hire not in terms of the individual as an individual player, but one has to take into account what he is going to contribute to the totality of the enterprise.

Q. It is not as likely that other clubs will be as aware of the team contribution of a player as the club for whom the player has made the contribution during the year, is that not true? A. I am sure it would be less, Mr. Hoynes, but how much less in this relatively small family. We are dealing with a relatively small family of 24 entities and a limited number of people in each entity.

If a fellow was self-interested and an egotistic person who was disrespectful and disregards the interests of the team, I suspect that his reputation gets around pretty quickly. I would assume so in this environment.

Q. But you would not deny that the system you suggest would put emphasis on individual achievement? A. It might, Mr. Hoynes.

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Alvin Ray Rozelle

[463] Direct Examination By Mr. Topkis:

Q. As a matter of operating practice, then, Commissioner, do I understand this contract to provide, in operation, that at the end of the term the club may renew the contract or exercise an option granted in the contract for one additional year, a salary of 90 per cent or more of the salary set in the contract and at the conclusion of that option year the player is a free agent, free to contract with anyone? A. Yes.

Q. Do I understand, Commissioner, that when a player does not sign a new contract but instead the club exercises the option of paragraph 10 for an additional year, the player, as a matter of terminology, is referred to as playing out his option? A. Yes.

Q. Could you tell us, Commissioner, how many players played out their option in 1969? A. My staff has advised me that there were about ten.

Q. And how about 1968? A. I can only estimate.

Q. An estimate will be satisfactory, if that is your best understanding and recollection.

[464] Mr. Hughes: Well—

The Court: He labels it an estimate.

Mr. Hughes: Well, your Honor, it seems to me there ought to be a direct question as to whether he really has any direct recollection or he hasn't, and if he hasn't, we just go on to another subject.

The Court: Yes, you are right, Mr. Hughes

Have you any recollection on that score, Commissioner?

The Witness: Without having my records I would have no accurate—

The Court: Then Mr. Hughes' objection is sustained.

Q. Commissioner, can you tell the Court whether the number was more or less than 25? A. In 1968?

Q. That's right, sir. A. Less.

Q. And in 1967?

Mr. Hughes: What is the question?

Mr. Topkis: I am sorry. I will rephrase the question in full.

Q. In 1967, Commissioner, can you tell the Court whether the number of players playing out their option was more or less than 25? [465] A. Less than 25.

The Court: How may I interrupt? I am quite sure I know what it means, but for the sake of the record what does "playing out the option" mean, Commissioner?

The Witness: At the expiration of the contract, the club has at its option a one-year option for the player's services. Should he not sign a new contract with that club but choose to play during the option year of his contract without a new contract, the common terminology for that is playing out his option.

The Court: Thank you.

Q. Now, Commissioner, as I understand it, somewhere in the constitution and bylaws there is a provision, and perhaps you will draw my attention to it and save me the task of reading through, there is a provision that when a player, a free agent, who has played out his option, signs with another club, the Commissioner is empowered to com-

pensate the club for which he formerly played by requiring the assignment of one or more player contracts to that club, is that correct, and if I have misstated the facts, would you straighten me out?

Mr. Kramer: Your Honor, I am going to object to this on the ground that the system is absolutely plainly stated in the constitution and bylaws, Plaintiff's Exhibit [466] 12, and I suggest we read it.

The Court: I would appreciate it if you would because I haven't it before me and it would make it much more intelligent to me to understand the significance of the question.

Mr. Topkis: Gladly, your Honor.

Q. Commissioner, would you call our attention to the relative paragraph or paragraphs of the constitution? A. It is Article XII.1H, the bottom of page 25 of the printed 1969 book.

Mr. Topkis: May I read that into the record, your Honor?

The Court: I wish you would. Yes, please.

Mr. Topkis: That is subparagraph H, Commissioner?

The Witness: Yes.

Mr. Topkis: It reads, your Honor, "Any player whose contract with a club has expired"—

The Court: Please take it slowly.

Mr. Topkis: Yes, your Honor. I will repeat it, if I may.

"'Any player whose contract with a club has expired shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player becoming [467] a free agent in such manner thereafter signs a contract with a different club in either the NFL or the AFL, then, unless mutually satisfactory arrangements have been concluded between the two clubs, the Commissioner may name and then award to the former club one or more players from the active reserve or selection list, including future selection choices of the acquiring club as the Commissioner in his sole discretion deems fair and equita-

ble. Any such decision by the Commissioner shall be final and conclusive."

That is the full text.

Q. Now, Commissioner, have you on occasion exercised the power granted to you under subparagraph H which I have just read into the record? A. I have on occasion exercised that obligation.

Q. Well, I notice that the language of the subparagraph would appear to be discretionary rather than language of obligation. I don't mean to quarrel with you, but as I read it, it read the Commissioner may name and then award to the former club, et cetera. So let me ask you this question to clarify the record, if I may. Have you in all instances where a player has become a free agent and then signed a contract with a new club awarded a player or players to the former club?

Mr. Hughes: Just a minute. I object to that [468] because that is patently a question that does not even accord with the language of the rule itself. The rule itself says that the functions in that capacity, whatever it is, are only as and if the two clubs don't get together and agree on an appropriate compensation. So I object to the form and the substance of the question.

Mr. Topkis: I will modify the question, your Honor.

The Court: You withdraw the question?

Mr. Topkis: I withdraw the question and put this question to the Commissioner.

Q. During your tenure as Commissioner, am I correct that this language has been, despite whatever modifications may have been made as a matter of form, as a matter of substance, has remained the same. A. Since about 1961 or 1962.

Q. Now, during that time, Commissioner, there have been occasions, have there, when a free agent has been signed by a new club? A. There have been occasions where a player has played out his option and later signed with another team.

Q. In some of those occasions have the two clubs been able to work out a mutually satisfactory arrangement? A. Yes.

Q. And in other occasions have they not? [469] A. Yes.

Q. And in those latter occasions, about how many of them have there been in the last eight years or nine years, whatever time this rule has been on the books? A. Occasions where the clubs have not agreed, not reached a mutually satisfactory conclusion to the problem?

Q. That is right, Commissioner. A. Three or four, I would estimate.

Q. And in those three or four situations have you stepped in and performed under subparagraph H? A. Yes, sir.

Q. I see some blank space at the end of this contract, Plaintiff's Exhibit 13, on the back, following Paragraph 18. Are you familiar with that blank area? A. Yes.

Q. Is that sometimes filled in with additional clauses and provisions? A. Yes.

Q. Incidentally, Commissioner, all contracts are filed with your office or copies of them? A. Yes.

Q. Now, has there ever, to your recollection, been a contract filed with your office which contained either by deletion of a provision in the printed form or by addition [470] of a provision written in, has there ever been a contract which provided that it could not be assigned by the club? A. Yes, there have been such contracts.

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[473] Q. Would you, just so the record may be clear, tell the Court how this common draft operates? A. The 26 teams of professional football select from the graduating college seniors over seventeen rounds of the selection system, and the 26 teams select in each round in the inverse order of their standings of the previous season.

In other words, the team with the poorest percentage record would select first in each round, the team that wins the Super Bowl would select last in each round.

Q. And do I understand, Commissioner, that when a team selects a player, that team acquires the exclusive right as against the other teams to negotiate with that player for his services in professional football? A. Yes.

Q. Incidentally, Commissioner, there is a professional football league operating in Canada, is there not? A. Yes.

Q. And many American football players play in that league and have in the last ten years? A. Yes.

Q. Is there any common draft with that football league, that Canadian football league? A. I am not aware of their rules or procedures.

[474] Q. In any event, you don't have any arrangement with them relating to a common draft? A. Oh, no, no.

Q. And so that today even with the NFL and AFL under common jurisdiction the Canadian League still competes with the combined American leagues for players, is that right? A. Yes.

Q. Commissioner, going back to the time before the merger—the merger was effective in 1966, did you say, or initially effective? A. Yes.

Q. When was your first common draft of the NFL and the AFL? A. Following the 1966 playing season.

Q. How long had the AFL existed? A. The AFL was formed in 1960.

Q. From 1960, then, through 1966, there was no common draft as between the two leagues, is that right? A. That is correct.

Q. And during that time did the NFL have a player draft of its own? A. Yes.

Q. Did it operate the same way the common player [475] draft now operates except that fewer clubs participated? A. Yes.

Q. And to your knowledge, did the AFL have a similar player draft? A. Yes.

Q. Operating as to AFL teams? A. Yes.

Q. But as between the two leagues there was no common draft? A. That is correct.

Q. So that you competed with each other for players? A. Yes.

Q. Now, Commissioner, when the AFL was initially formed, was its player strength in substantial measure drawn from NFL players? A. No.

Q. They drew them from outside the ranks of the NFL players? A. The NFL players were under contract with NFL teams.

Q. Right, and they stayed with their NFL teams so the AFL got other players, is that right? A. Yes.

Q. In the years following, however, I take it the NFL players had the freedom to play out their option and [476] if they wished move to AFL teams or other NFL teams, for that matter, is that right? A. Yes.

Q. And did many do so, to the AFL? A. Would you repeat that, please?

Q. Did many NFL players play out their option and move to the AFL? A. No.

Mr. Kramer: Could we have a time period included in the question, please?

Q. Begin from 1960 to 1966. A. No.

Q. A very few, a handful? A. Very few.

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[478] Q. I see. Now, Commissioner, the final question that I spoke of. In your opinion, garnered from your 16 years in professional football, has the existence of the right in players to play out their option hurt or helped professional football? A. Football has been able to live with its rules and live effectively, I feel.

Q. And profitably? A. On occasions.

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[480] Q. Has the existence of that option clause and the right of a player to play out his option injured or in any way impaired the integrity of professional football? A. Not to my knowledge.

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[481] Q. With reference to Exhibit 12, the 1969 version of the constitution and bylaws, and with particular reference to Section 12.1H, which provides in substance that compensation will be determined by the Commissioner in the event the two clubs involved with a player who has played out his option can not agree to compensation, was that clause and the substance of that provision always present in the National Football League rules? A. No.

Q. Approximately when was it added to the rules? A. About 1961 or 1962.

Q. Mr. Rozelle, what was the situation with respect to a player's playing out of the option prior to the adoption of Rule 12.1H in 1961 or 1962? A. His contractual condition was the same. However, there was no provision in the constitution providing for compensation to the club that he was to leave.

Q. So that before the rule change in 1961 or 1962 a player who played out his option could negotiate with another club and that other club need only be concerned about compensating the individual player in terms of salary and so on, that club was not required to compensate the club, the former club, of the player who had played [482] out his option? A. That is correct.

Q. The result of the rule change, therefore, makes it obviously somewhat more expensive in terms of compensation to a club which is considering acquiring a player that has played out his option? A. They were called upon to provide compensation to such a club he was leaving, in addition to negotiating with the player.

Q. I believe you testified that the old National Football League merged in June of 1966, is that correct? A. Yes.

Q. Subject to the implementation of certain aspects of the merger that you have just recently finally completed? A. Yes.

Q. Concerning the realignment of teams? A. That was part of it, yes.

[483] Q. Was some special Congressional legislation required or sought by the National and American Football Leagues to authorize that merger?

Mr. Topkis: Objection, your Honor, on the grounds of the witness' competence. The term "required" I should think would call for a legal conclusion.

The Court: I will allow it. The witness impresses me as being well possessed. I think if he can't answer it he will tell us.

Would you repeat the question, please, Mr. Reporter.

(Question read.)

A. On advice of our counsel, we felt that it was required, yes.

Q. Did you personally testify in favor of the measure which authorized the merger? A. Yes.

Q. Did Congress act to authorize the merger? A. Yes.

Q. Was that act not in the form of an amendment to the Telecasting of Professional Sports Contest Section of U.S. Code 15 USC 1291?

Mr. Topkis: If your Honor please, we will so stipulate.

The Court: It is so stipulated, if you will ac- [484] cept it, Mr. Hoynes.

Mr. Hoynes: I'll be pleased to accept the stipulation.

Q. Mr. Rozelle, was not a purpose of the merger the institution of a system of common draft between the two leagues? A. Would you please repeat that?

Q. Was not one of the purposes of the merger the desire of the two leagues to arrive at a common draft of players? A. Yes.

Q. And prior to the merger the two leagues conducted a separate draft with many overlapping choices, that is to say, is it not true that the leagues prior to the merger drafted many of the same players and were in competition with respect to the signing of those players? A. Yes.

Q. That competition was eliminated by the merger? A. Eliminated by the single draft that followed the merger announcement, yes.

Q. In your opinion, Mr. Rozelle, does not that common draft tend to equalize the playing strength among the teams in a combined National Football League? A. Yes, because prior to the merger the competition was really not between two leagues as much as it was between [485] the strong teams of each league, and we had a growing tendency of the stronger teams getting stronger and the weaker teams in each league dropping out of the competition, in effect, for talent.

Q. Is not equilization of competitive playing strength a necessary aspect of the successful operation of the professional league sport? A. It certainly is in the one I am conversant with, football, yes.

Q. Well, I really was concerning myself primarily with football. In your opinion, Mr. Rozelle, was the adoption of this common draft an important, indeed necessary ingredient in the maintenance of equalized playing strength among the clubs? A. Yes, because I feel that if we had not had it we would have had several clubs in both leagues fail.

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J. Walter Kennedy

[519] Direct examination by Mr. Topkis.

Q. Commissioner, I notice that in Paragraph 1 of the Uniform Player's Contract—forgive me. Let me begin with a preliminary question. This Uniform Player's Contract, is its form prescribed by the Commissioner's office? A. Yes.

Q. And are all contracts between clubs and players in the NBA required to be on this form? A. Yes, or riders thereof.

Q. I notice that in Paragraph 1 it provides:

"The club hereby employs the player as a [520] skilled basketball player for the term of one year from the first day of October, 19——."

On occasion are there contracts for terms of more than one year? A. Yes.

Q. Two years sometimes? A. Yes.

Q. Three? A. Yes.

Q. Four? A. Yes.

Q. Five? A. Yes.

Q. Any longer number of years? A. I recall no contracts longer than five years.

Q. And do I understand and would I be correct in saying that contracts must be approved by the Commissioner's office before they become effective? A. Yes.

Q. So that you have approved contracts with a duration of as much as five years? A. Yes.

Q. Commissioner, I see in Paragraph 10 of the following language:

[521] "The Club shall have the right to sell, exchange, assign or transfer this contract to any other professional basketball club."

On occasion has that language been stricken and other language been written in the contract which you have approved? A. I don't recall any with any change in that paragraph.

Q. There was a report in the press, as I recall it, a few months ago that Oscar Robertson had a contract giving him a veto over any assignment of his contract. A. That was contained in a rider in his basic contract at the time it was entered into.

Q. I see. Have there been other instances of such riders? A. I don't recall any other than the Robertson case.

Q. You, however, approved the Robertson contract with that rider? A. Yes.

Q. And the existence of that rider in other contracts would not deter you from approving it?

Mr. Hughes: I object to that as hypothetical.

The Court: Yes, I think so. Objection sustained.

[521a] Q. Is there any league or association policy against such riders? A. No.

[522] Q. Commissioner, I see in Paragraph 22 of the Uniform Player Contract; Plaintiff's Exhibit 16, a proviso which, if I may summarize it, gives the club the right to

renew the contract for a further period of one year. Are you familiar with that language? A. Yes.

Q. At the end of that year of renewal, as the contract is construed and interpreted by you in your capacity as Commissioner, is the player free to negotiate with any other club for his services as a professional basketball player? A. I have never been confronted with that decision.

Q. And you would rather not decide a hypothetical question? A. Yes.

Q. To your knowledge has any player ever signed with another club after playing out his option, as the term has it? A. We do not have a playing out the option clause in our contract.

Q. Have you ever known a player at the end of the option year provided in the Uniform contract to negotiate with and sign with another club? A. Yes.

Q. Would you tell the Court the circumstances? [523] A. There have been several instances in the past two or three years where a player signed to a National Basketball Association contract has jumped the contract, to use the common term, and signed a contract with teams in the American Basketball Association.

Q. The American Basketball Association is a competing association of professional basketball teams? A. Yes.

Q. Operating more or less throughout the country? A. Yes.

Q. And do I understand your testimony to mean that at the end of the option year of a player's contract, that is, the second year, some players have they jumped or have jumped before? A. They have jumped before.

Q. During the initial year of their contract? A. And in one or two instances while the contract was still in force under the basic terms of the contract.

Q. But in most instances the jumping has taken place after the expiration of the basic term? A. I would hesitate to say in most instances.

Q. In a number of instances? A. Yes.

Q. Commissioner, does your league conduct a player [524] draft? A. Yes.

Q. When do you do that? A. Usually shortly after the termination of college play each season.

Q. Would you describe to his Honor how that player draft works? A. The National Basketball Association teams draw in inverse order of their standing during the previous standing from the college players whose eligibility has been completed.

Q. And do I understand that they draw the right to negotiate with those players as opposed to any other team in their league? A. Yes.

Q. Does the ABA—that is the term by which the American Basketball Association is known, isn't it? A. Yes.

Q. Does the ABA conduct such a player draft? A. Yes.

Q. Does it thus happen that given players might be drafted by teams from both leagues? A. Yes.

Q. And do the two teams which have drafted the players then compete for the players' services? [525] A. Yes.

Q. Have you ever approved, Commissioner, a contract with a player in which Paragraph 22, this option paragraph, if I may so call it, was stricken? A. No.

Q. So that even in the multi-year contracts, the contracts of four or five years duration, all contracts in the NBA which you have approved have contained this Paragraph 22? A. Yes.

Q. Have you ever approved, Commissioner, contracts in which the level of compensation stepped up from year to year? A. Yes.

Q. Now, you said before that you had seen only one contract, Oscar Robertson's, which gave the player a veto over a trade; that's right, isn't it? A. Yes.

Q. Have you, however, on occasion, approved contracts in which a player would receive a portion of any consideration received for the assignment of his contract? A. I don't recall ever having approved such a contract.

Q. Have you approved any contracts or have there been

[526] filed with you any contracts which provided that the player would have some say of any kind as to the assignment of his contract other than the Robertson contract? A. I don't recall ever having approved such contract.

Q. Commissioner, would it be your opinion as a result of your 8 years of jurisdiction over the activities of the NBA that play in the NBA is characterized by a high order of integrity on the part of the players and the teams? A. Yes.

Q. Would you go so far as to say the highest? A. Between player and teams?

Q. No. Is the play on the floor and the play as between teams characterized by the highest order of integrity? A. Oh, yes.

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[529] Q. Right. Commissioner, are there any minor leagues in professional basketball? A. Not in the sense that there are minor baseball leagues. There are other professional basketball leagues [530] not of the stature of the National Basketball Association.

Q. How many of those are there around the country? A. To the best of my knowledge, two.

Q. What are their names? A. One is the Eastern Basketball League and one is in the Midwest, and I believe last year it was called The Mid-American Conference.

Q. And, in addition, are there industrial leagues or leagues made up of teams sponsored by industrial enterprises? A. Yes.

Q. Do the players in such leagues receive compensation for playing basketball? A. For the most part, those organizations are part of the AAU structure, and the compensation that would be given to the player is part of his salary.

Q. As an employee of the particular company concerned? A. Yes.

Q. Do I recall that some years ago there was a team called Phillips Oilers— A. Yes.

Q. —sponsored by the Phillips Petroleum Company? A. Yes.

Q. Was George Mikan a member of that team? [531] A. I don't believe George Mikan ever played with the Philadelphia Oilers.

Q. Phillips Oilers. A. Phillips Oilers.

Q. But it was a team of first-class quality? A. An amateur team.

Q. Yes, as Paul Gallico said, "Amateurs, there ain't no such thing." Strike that, please.

Commissioner; referring now to the Eastern League and the Mid-American League—

A. I believe it was the Mid-American Conference.

Q. Mid-American Conference. —do teams in the NBA on occasion sign players from the Eastern League or from the Mid-American Conference? A. Yes, I recall one or two instances.

Q. There is no bar to any such signing, is that right? A. Well, in signing them, they were signed after the completion of the season. In other words, the NBA signed those players between seasons. I don't ever recall a player being signed during the course of a season.

Q. They were rather signed after the season as to which they had an operating contract expire? A. Yes.

[532] Q. So that there was no interference with a contractual commitment, is that the point you are trying to make? A. Yes.

Q. But on occasion there have been instances where NBA teams signed players from other leagues following the expiration of their contract? A. Yes.

Q. Has that happened also, Commissioner, with NBA teams signing players who had been under ABA contracts? A. To the best of my knowledge, no NBA team has ever signed a player under contract to an ABA team.

Q. But following the expiration of a player's contract with an ABA team, has a NBA team on occasion signed such a player? A. Yes.

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[534] Cross Examination by Mr. Hoynes:

Q. Mr. Kennedy, you testified a few moments ago that the National Basketball Association did not have any procedure which we have come to call the procedure of playing out your option, is that correct? A. That's correct, yes.

Q. You also stated that some National Basketball Association players had in the past few years, both during the term of their basic contract and afterwards, jumped, I think is the phrase you used, to another league in the American Basketball Association. A. Yes.

Q. To your knowledge has any National Basketball Association player ever jumped or moved without the consent of his club to another National Basketball Association club under your jurisdiction? A. No, to the best of my knowledge, no.

Q. I believe you mentioned that you had not disapproved a rider attached to the contract of the Cincinnati now Milwaukee player Oscar Robertson which provided, in ef-
[535] fect that his contract could not be assigned by the Cincinnati club without his consent; is that correct? A. Yes.

Q. In your experience in basketball are you aware of any other instance in which such a rider or provision varying the assignability clause was included in a player contract? A. I recall none.

Q. Mr. Topkis elicited from you the fact that there are some lesser basketball leagues, at least two, existing in the United States. I believe you mentioned the Eastern League and the Mid American Conference. Does the NBA have any working arrangements with these leagues? A. No, they do not.

Q. Does the NBA subsidize these leagues? A. No, they do not.

Q. Therefore these leagues are not part of the player development structure, if you will, of the National Basketball Association? A. No.

Q. Do you view your primary if not exclusive source of player talent and training ground as the American colleges and universities? A. Yes.

[536] Q. In Mr. Topkis' examination mention was made of the American Basketball Association. How long has the ABA, for short, been in existence? A. Three years.

Q. Do not the club owners of the two major basketball leagues, the American Basketball Association and your league, the NBA, propose, subject to Congressional approval, to merge their operations?

Mr. Topkis: Objection, your Honor, calling for a legal conclusion from the witness as to Congressional approval.

The Court: Can you answer the question, Commissioner?

The Witness: I believe so.

The Court: Objection overruled.

A. There have been and are still discussions taking place between representatives of both the ABA and the NBA with the ultimate thought of going to Congress for Congressional approval of a possible merger.

. . . . . .

[540] Q. Mr. Kennedy, you have no opinion, then, on the necessity of the merger of the two leagues? A. No.

Q. Mr. Kennedy, during the last few years when these two leagues, the NBA and the ABA, have been existing side [541] by side, each has conducted a separate draft of college players? A. Yes.

Q. Have there been a number of players drafted by clubs in the rival leagues, double drafted, drafted by an ABA club and drafted by an NBA club? A. Yes.

Q. Has there been intense competition between the two leagues for the signing of these draft choices who have been sought by both leagues? A. In some instances, yes.

Q. One feature of the proposed merger would be to adopt a common draft, pursuant to which the two leagues would engage in one unified draft, is that correct? A. Yes.

. . . . . .

[551] Direct Examination by Mr. Iverson:

Q. I would like to read Section 11 which reads:

"It is mutually agreed that the club shall have the right to sell, sign, exchange and transfer this contract and to loan the player's services to any other professional hockey club, and the player agrees to accept and be bound by such sale, exchange, assignment, transfer or loan and will faithfully perform and carry out this contract with the same purpose and effect as if it had been entered into with the player and such other club."

Now, this section obviously allows the club to trade players, as the phrase is used.

To your knowledge, have any contracts signed by National Hockey League players not contained such paragraph? A. To my knowledge, most or all of them contain that clause, but some contracts have additions to them which would give players greater privileges.

Q. Could you describe the nature of those additional provisions? [552] A. There would be an additional clause in some cases that would simply say, "No cut, no trade" or spell out these details out at length.

Q. Some— A. There would be—

Q. Some contracts do allow the player a veto over any trade? A. Yes, and others include a clause which would permit the player to renegotiate with his new club, if he is traded. This power generally rests with the stars.

Q. I see. A. Or the super-stars.

Q. What would be in your experience—what is the effect of the renegotiation clause? Do players in fact renegotiate their salary, and do they normally receive a salary increase? A. Yes. I would say it is beneficial to have that clause included, so that the player who has then been traded for is now an asset of the new club. He is in a better position to bargain.

Q. And in some cases is that increase in salary a substantial one? A. Yes.

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[563] Q. Mr. Eagleson, is there what might be called a minor league system affiliated with professional hockey? If so, could you describe it to the Court? A. Yes. There are three leagues, professional leagues. One is the Central Hockey League, the second is the American Hockey League and the third is the Western Hockey League. As to how they operate, they run their hockey leagues in the same manner as the National Hockey League except that in many instances the players on the rosters of the clubs in the American and Western Leagues are loaned by National League Clubs and in the Central League the clubs are in fact owned, I think now, 100 per cent of the cases by National League Clubs themselves.

Q. So to summarize your testimony, the Central League, and I take it that is the lowest or the lower of the two minor league tiers— A. The Central League people would question it insofar as ability is concerned, but I would think it is [564] fair to say that the Central League is the primary level, the secondary level includes the American and the Western Leagues on an even basis, and the National League at the third level.

Q. The Central League teams are owned by NHL teams? A. Yes.

Q. And the American and Western League teams, you say that these players frequently are on loan from the National Hockey League teams. Are they loaned on an individual basis or will commonly a NHL team have an agreement with a particular club or clubs? A. In most cases a working arrangement exists between a specific club. However, there have been examples of a player being loaned from one National League organization, one National League club, on one occasion to three different Central League teams in one year. So it depends on the circumstances.

Q. From your knowledge, do the National Hockey League teams contribute substantially to support these minor league teams and leagues? A. Yes, they do. To the Central League particularly. I think the extent of financial participation in the Western and American Leagues is limited, to my knowledge, to player help.

[565] Q. Finally, from your knowledge of the game, would you say that professional hockey, while you have been affiliated with it and following it, has been characterized by the highest order of integrity and public confidence in the sport? A. I think that is a fair statement, yes.

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Clarence Sutherland Campbell

Direct Examination by Mr. Topkis:

[568] Q. Now, you were in court when Mr. Eagleson testified? A. Yes, I was.

Q. You heard the questions that were put to him and the answers which he gave? A. Yes.

Q. Were you asked the same questions would you give the same answers? A. I am afraid not.

Q. Except for those as to his profession and so on? A. Oh, yes.

Q. But those as to the operation of hockey— A. That's right, there were a number of errors, yes.

Q. Would you tell the Court the respects in which your testimony would differ from Mr. Eagleson's? A. Well, basically my principal difference would relate to what I call the inviability of the form of the contract. There has never been a contract approved by me, and they all require to be approved, which contains any variation whatsoever of the basic terms of the contract save as to bonuses and that provision. There is no way in which anyone, not even I, can modify the terms that are therein contained.

Q. Are there any other variances between your testi-
[569] mony and Mr. Eagleson's, or is that the chief one? A. I wouldn't want to try to recall the things that were asked, but perhaps you will permit me to go back so as not to cre-

ate—I don't want to create the impression that Mr. Eagleson was endeavoring to mislead anyone. I am sure he wasn't.

The Court: No, there is no question on that score at all.

A. The situation, when he referred to no cut, no trade contract, what he meant, I sm sure, is that the player, when he signed, made a collateral agreement with the club or with the management of the club to that effect, but it has no effect at all so far as the administration of the league is concerned. It wouldn't make any difference if it was made under seal as far as the league is concerned. It would not be recognized because of the fact that the contract itself says in nice big red letters that this is the sole contract and that is all there is to it.

Now, what the efficacy of any outside arrangement would be, it is not for me to say. I don't know what the consequences would be, but definitely any such changes would have no consequences whatsoever inside the hockey orbit, shall I say, and the player would just be subject to waivers, he would be subject to draft and all other provisions. [570] Q. But there have been instances where there were private agreements or letter agreements or something like that? A. Oh, I am sure there have, yes.

Q. It has been suggested to me, Mr. Campbell, that in at least one instance there was a specific variance of a written contract on the standard form itself, and the instance to which I refer is of a contract between a player known as Don McKenney and the National Hockey League club known as the St. Louis Blues for the 1967, 1968 season. A. Yes.

Q. Do you recall that contract? A. I remember some controversy about it, but I can't, without looking at it, I couldn't be specific.

Q. You don't have the contract with you? A. No, I do not.

Q. Is it possible, sir, that that contract did in fact contain a no cut, no trade clause? A. I wouldn't say that there is not some language attached to the contract that was in-

terpreted by the player himself to have that effect, but I know I gave no effect to it.

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[571] Cross Examination By Mr. Hoynes:

Q. Mr. Campbell, with reference to Plaintiff's Exhibit 18, the player's contract or Standard Player's Contract of the National Hockey League, is it not true that Paragraph 21 of that contract provides as follows:

"It is severally and mutually agreed that the only contracts recognized by the President of the league are the Standard Player's Contracts which have been duly executed and filed in the league's office and approved by him and that this agreement contains the entire agreement between the parties and there are no oral or written inducements, promises or agreements except as contained herein"? A. That is the standard provision, yes.

Q. Pursuant to that paragraph, then, you, as the administrative head of the National Hockey League, would not give effect to collateral promises or agreements? [572] A. That is correct.

Q. Is it not also true, Mr. Campbell, with reference to Plaintiff's Exhibit 20, the National Hockey League bylaws, that Paragraph 2 of Section 2 provides as follows with reference to the Standard Player's Contract:

"The provisions thereof shall not be changed or derogated from except as may be authorized by resolution of the Governors."

Is that correct? A. That's correct.

Q. Who are the Governors? A. The Governors are the individuals designated by each member club, one each, and they constitute the Governors of the league.

Q. So that as I read the bylaws of the National Hockey League, you would have no power to approve a variance in the Standard Player Contract. The power to approve such a variance is vested exclusively in this Board of Governors who must act by resolution? A. That's correct. I have no discretion in the matter at all.

Q. Has there ever been an instance in which the Board of Governors has acted to approve a variation in a Standard Player Contract, to your knowledge? [573] A. Not during my term of office.

Q. How long have you been President of the National Hockey League, Mr. Campbell? A. Since September the 4, 1946. I am in my 24th year, I think.

Q. So your experience covers quite a span? A. Well, yes.

Q. Mr. Campbell, Mr. Topkis, in examining Mr. Eagleson, elicited the information that there are other minor, if you will, hockey leagues. A. Yes.

Q. Would you explain to the Court in some detail the player development relationship that those leagues have to the National Hockey League and the extent to which those leagues are subsidized or otherwise receive support from the National Hockey League? A. Yes. So long as I have been associated with hockey, or certainly since the early thirties, there have been arrangements made, two sets of arrangements, one made with the so-called minor leagues —I don't like to call them that, but that is what they are generally referred to as—and also with the Canadian Amateur Hockey Association and the Amateur Hockey Association of the United States, both of which are extremely important and designed primarily to regulate the [574] relations between us so that we don't do each other any injury and to accommodate the provision of players to minor league clubs, and also to provide for the drafting of players and even more important, as far as they are concerned, for us providing players for them.

In addition to that we have a very large supporting program for amateur hockey which this year, this past season we paid over $800,000 to the Canadian Amateur Hockey Association to assist them in the development of amateur hockey.

Now, the way in which we provide players to the minor league clubs—there are two ways: One of our teams might become the owner of a minor league operation, a team in

Q. With reference to your earlier answer to my question about the player development arrangement in hockey, would you say it is fair to say that you have extensive and expensive player development arrangements? A. Yes. This is one of the really serious problems of professional hockey, is that we do have to develop our own talent. There's no sources of material, of playing material available to us any place else except from the institutions and the organizations which we support, none whatever.

The universities—some of our players from Canada come down and they play in upwards of fifty colleges, I imagine, but there are no native trained players that have—I should not say none. There may be three or four in the United States. Therefore, the player development, early player development is really in the amateur ranks, which we support. Then they are recruited or whatever term you use, to get them to American colleges, where hockey has become very popular, and they frequently—they—now we get many players from United States colleges, but they are expatriated Canadians.

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Q. Mr. Campbell, considering the extensive and expensive [579] player development costs and arrangements which hockey has, and referring only to your sport and to none other for the moment, what is your opinion about the reasonableness and necessity of player control arrangements which the National Hockey League clubs enjoy through their contract and bylaw provisions? A. Well, let me say this: If it were not for the security which the league affords to its members, in other words, that all members afford to one another as to the proprietary interest which they can maintain in the talent which they develop, it just couldn't be done. Nobody would run that hazard. It would be quite impossible, and the cost is tremendous.

I would think that on the average, our minor league operations, including scouting and things of this character,

would represent a net loss to every club of upwards of $200,000 per year.

Q. So that in your sport, with its particular needs and requirements, including specifically the player development costs, player control arrangements are a necessary and vital part of your existence? A. If it were not for that assurance, no one would spend that kind of money. They just couldn't.

Q. With reference, again, to Plaintiff's Exhibit 20 [580] of the National Hockey League bylaws, is there not a provision in these bylaws relating to an amateur draft? A. That is correct.

Q. I believe that provision is— A. 16(b).

Q. Section 16(b)? A. That's right.

Q. Would you describe the amateur draft? A. Yes. Down to 1966, it had been the practice, authorized practice of professional NHL and other professional teams to be permitted to specifically sponsor two individual amateur teams from whose rosters the sponsoring club would be able to recruit without interference from anyone else such talent as they had developed. They paid the expenses of all this—the individual clubs did—and they just took the players up in the ordinary way. This was considered to be an unrealistic practice so far as the expansion of our league was concerned when it occurred in 1967, because of the fact that—in other words, previously there had only been a total, I think, of fifty-four sponsored teams all together. The best territories in which to operate had already been taken up, so that for the six new division teams there would be—they would be terribly outclassed in the sponsorships which they would be able to develop at [581] that time.

There was also some feeling on the part of the amateurs that perhaps there was a greater measure of participation in their affairs by reason of this sponsorship, and they invited us to withdraw, which we did. We abandoned all sponsorship, and in return they said, "We will welcome

your conduct of a universal amateur draft, but we want you to undertake, in addition to that, that you will not take any players at all any place in professional hockey who have not graduated from junior hockey, in other words, who have not exhausted their eligibility," which is based on under twenty on December 31st of the year in which they play.

Now, this arrangement has worked out quite well. These players or at least the teams from which these players are drafted are compensated, not as extensively as some of them would like, but we are taking steps to have that increased, and the program seems to be working out quite well. There are—there have been, I would think, about—on the average I would think there would be about 75 to 85 players drafted in each year.

Q. Do the clubs in the National Hockey League draft in any particular order? A. Yes. We have—since we have a rather elaborate [582] play-off system, we used to have an arrangement by which the non-play-off clubs took priority, but that is no longer true. Last year we modified this bylaw you have just referred to, amateur draft bylaw, 16(b) to provide that they will draft in inverse order of their points standing at the end of the previous season, without regard to which division they are in.

Q. So that the effect of this draft is to equalize the playing strength among the clubs by permitting the lowest ranking club to have the primary choice? A. That's precisely the objective, yes.

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[586] Redirect Examination by Mr. Topkis:

Q. Mr. Campbell, I see in the Uniform Player's Contract —the Standard Player's Contract, rather, a provision, and I am referring to Paragraph 17, which reads as follows:

"The player hereby undertakes that he will at the request of the Club enter into a contract for the [587] following playing season upon the same terms and conditions as this contract save as to salary, which shall be deter-

mined by mutual agreement. In the event that the player and the Club do not agree upon the salary to be paid, the matter shall be referred to the president of the league and both parties agree to accept his decision as final." A. That's right. That's what the contract says, and it has not been changed officially although the owner-player council to which Mr. Eagleson referred had agreed that the final sentence of that clause 17 would be inoperative and that there was replaced or it was replaced by an arrangement by which it was sought to have what I might call a multiple arbitration where each side selected one and the two original appointees appointed the third arbitrator, but no such arbitration has taken place.

Q. However, the right exists? A. That's right.

Q. So if a player and a club are unable to agree on the salary which the player shall receive in the option year of his contract, then both the player and the club have the right to go to arbitration? A. This is correct.

Q. And that has been true for how long, sir? [588] A. One year.

Q. And before that time both the player and the club had the right to seek your determination of the salary level which was fair, is that right? A. That is correct.

Q. And that has been true for 24 years? A. Yes.

Q. Or as long as you have been president of the National Hockey League? A. That's right.

Q. And I take it that in your functioning in that capacity you have done your best to be fair to both player and club? A. I have, and I don't want to discuss unnecessarily the method—

Q. No. I think you have answered my question. A. Let me say this, I don't like to be patting myself on the back, but let me put it this way. In the two preceding seasons before this arbitration was dispensed with, there were thirteen arbitrations in all and I am happy to say that Mr. Eagleson expressed his approval of my efforts.

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[590] Recross-Examination by Mr. Hoynes:

Q. Mr. Campbell, with reference to this amendment to Paragraph 17 of the Standard Player Contract which is not contained on the printed form, but is in resolution form, I believe, was that change arrived at as part of a process which we might describe as collective bargaining between the players' representatives and owners' representatives? A. I would say that that's a fair statement, yes.

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Bowie K. Kuhn

[645] Direct Examination by Mr. Kramer:

Q. What are the organizations comprising organized baseball? A. Organized baseball consists principally of the following: The office of the Commissioner of Baseball, the National League and the American League the two major leagues, both of whom have offices operated by league presidents; the National Association of Professional Baseball Leagues, commonly known as the minor leagues, which is run by an office in Columbus headed by President Phil Piton. These are essentially the basic structures within organized baseball as it exists in North America.

Q. About how many leagues are there that are members of the National Association of Professional Baseball Leagues? A. Today the National Association has 21 leagues in the United States, Mexico and Canada.

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[674] Q. In your study of the history, was that rule successful in eliminating player raiding?

Mr. Topkis: Objection, your Honor. Now it seems to me the witness is not giving casual background but he is going to the very heart of significant material and this, again, has all been stipulated pursuant to the statements of fact made in the Celler Report. I don't believe that the witness would propose to vary the Celler Report and he is not an

expert in this field, your Honor, not that I doubt his expertise on baseball as it operates today, but all the witness has said, after all, is that he read five books. If that makes an expert, qualifying experts in these courts is going to get an awful lot easier than it ever has been before.

The Court: Mr. Topkis, again I say strictly speaking you are correct, but you have got to remember that I have not absorbed, as you have, the full significance of these exhibits. I couldn't begin to match you with regard to what you have learned from the Celler Report. I shall later on have the full import of it, and then I will be on all fours with you, I should think, but right now I am anxious to get the reactions of these witnesses and I have allowed great flexibility with respect to the plaintiff's witnesses and I intend to do it pretty much [675] throughout the entire trial for obvious reasons. And so I am going to overrule your objection and repeat again, strictly speaking there is much merit to what you say but I think it would help me to get these living answers to the questions.

Mr. Topkis: Deferring again to your Honor's ruling, of course, may my continuing objection on this additional ground of the witness's lack of expertise be noted?

The Court: Certainly.

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[680] Q. Mr. Kuhn, on page 229 of Plaintiff's Exhibit 15-A, the Celler Report, I would like to direct your attention to the second sentence in the last paragraph on that page, which states: "Baseball's history shows that chaotic conditions prevailed when there was no reserve clause."

In your study of the early history of baseball, did [681] you come across evidence in support of the conclusion that chaotic conditions prevailed when there was no reserve clause? A. Yes.

Q. Please describe for the Court what your research revealed concerning those conditions. A. Taking the history of the game from the earliest organization or attempted organization of it in 1857, really up to the organization of

the present major leagues in 1903, your Honor, the history shows, I think, quite conclusively that in the absence of a reserve system or in the absence of a reserve system that permits a more than minimal number of players to be reserved, that a number of problems crept into the game which threatened its very existence. Among these, as I mentioned earlier, was the problem of revolving, both during a playing season and after a playing season was over, where players would go from club to club.

This was the way the Red Stockings of 1869 themselves. They went to other clubs in the National Association and attracted players and created this team, and because they were able to break even in that operation, this I think dramatized the possibilities of a professional operation, and thereafter it was quite commonplace for this revolving to occur whenever there was a reserve system that didn't inhibit, and the effect of this was quite clearly to shake public confidence in the [682] game, because the player playing for one team one year would be playing for another team the next, with the attendant suspicion that, particularly with the heavy amount of betting that went on, that he may have done something to benefit his second team while he was playing for his first team in the course of the race. This has a great effect on public confidence. Attendance was obviously affected.

The ability of clubs to survive under these circumstances was very limited. I think during the history of the National Association of 1871, which lasted only five years, there were 25 teams in that league during that time, the great majority of which failed, went out of business. Only three started and were able to finish the five-year period.

Profitability was very low, and in this climate of scrambling, not just ballplayers but clubs scrambling to see who could beat out the other guy ignoring the rules, there was created a most unhealthy climate for a professional game.

The rules became secondary. The clubs violated their own rules. The leagues violated their rules in competition

with one another. The players had little respect for the system of which they were a part, and, as a result, dishonesty became rampant in the game. Indeed, it [683] got so bad during a certain stage of this history that they said that the only people that bothered going to the ball games any more were the gamblers.

The ballplayers were fixing games. The clubs were fixing games. When the clubs did it, it was known as hippodroming, a term that has continued today, happliy not in baseball.

But the clubs would arrange a series of games with another team as part of the league structure when they didn't have a uniform schedule, and the clubs would arrange that one team would win one game and the other team would win the second game, and that would be a greater attraction for the third game, and they would hope to attract the public.

The entire climate was an extremely evil one for a professional sport, and it was cured, in my judgment, ultimately by an effective reserve system, plus a strong central government organization in baseball along with the safeguards that have been built into the system both with the reserve and with the strong central government.

Q. Mr. Kuhn, do you have any information as to how many of the clubs operated at a profit during that period when there was no reserve rule in effect? A. Well, if you take the professional leagues—

Mr. Topkis: Excuse me. Could we know exactly what [684] period the question refers to?

The Court: Yes. I have thought of that, too. What period again?

The Witness: May I give it?

The Court: Yes.

A. (Continuing) The professional leagues for the reserve were 1871 through and including 1879. The amateur leagues had also striven for profit, notwithstanding the name "amateur," but addressing myself just to the profes-

sional leagues, during that period I believe that only two teams were actually able to operate profitably, although perhaps forty teams were in existence during that period, forty or more.

The Boston Red Stockings, who have been the successors of the Cincinnati Red Stockings by stealing all their players, were champions in the National Association in 1872, 1873, 1874 and 1875. They were able to make a profit in '74 of, I believe, $65 and in '75 of $2,400. This was the only profitable team in the National Association in those five years, and I think on balance it lost money if you counted all the years.

In the first four years of the National League, only one team made money. That was Providence, in 1879, which in turn dealt Boston what it had dealt Cincinnati by stealing [685] all its outstanding players. It won the championship in 1879 and operated profitably. No other team during the decade operated profitably.

Q. You testified before the recess concerning the broadened reserve rule in, I believe you said, the early 1880's. Can you describe for the Court the effect of the adoption of that broadened reserve rule on organized baseball, with reference both to playing the game and the profitability? A. In 1883 the reserve was extended to eleven players, which covered most of the team. That, taken together with the National Association agreement, which ended the war between the National League and the American Association, permitted, once the war with the Union League in 1884 had been gotten behind them—the Union League failed—permitted an era in the last part of the 1880's of relative profitability of club operation and relative stability of players on teams, with attendant rises in attendance and public acceptance of the game.

Q. How about the players? Did they benefit or were they hurt? A. Initially, the player—total player salaries diminished under this system. Ultimately, during the balance of the decade of the '80's, the trend downward reversed it-

[686] self, and by the—during the last part of the decade—and I think actually this is well stated on page 25 of the Celler Committee Report, which is Plaintiff's Exhibit 15-A, you will see a statement which I think is worth having, your Honor. This is a stipulated statement.

"The ballplayers, too, benefitted from this new stability and prosperity. While the reserve rule had been directed against them to reduce salaries, in the long run they realized a greater income, partly due to the owners' desire to keep them satisfied, partly due to competition by rival leagues and partly due to the competition resulting whenever a weaker club forfeited its franchise and players. The average player salary doubled from 1880 to 1889. The players active throughout this nine-year period, Michael King Kelly's salary increased from $1,300 to $4,000; 'Orator Jim' O'Rourke's from $2,000 to $3,500; Deacon White's from $1,600 to $3,500. Buck Ewing's from $1,000 to $5,000, and John Montgomery Ward's from $1,700 to $4,250, just to name a few."

Mr. Topkis: Objection, your Honor, if I may, and I would ask that the answer to this last question be stricken. I should think that the witness reading from the Celler Report would be appropriate to summation but not to his testimony.

[687] The Court: Motion denied.

Q. What happened to the—I think we had better have a preliminary question, Mr. Kuhn.

What is meant by the term "revolving" as used in baseball? A. As I have described it, it is the movement of players from team to team within the season or from season to season.

Q. Did the adoption of the reserve system in the early history of organized baseball have any effect on revolving? A. Yes, it did, to the extent that it, of its number, whether it was five or eleven or twelve or fourteen, as the total reserve grew to be in 1887, to that extent it tended to prevent

any one of the three leagues. In fact, we own all of the teams. The National Hockey League teams own all the member clubs in this Central Hockey League because it is what we call primarily a player development league, not a gate receipt league.

Now, in addition to that our clubs own, the National Hockey League teams own three of the member clubs of the American Hockey League and they recently acquired one in the Western Hockey League and there are almost an unlimited number of affiliations, loaning arrangements of various kinds.

Now, that is the first way in which we operate.

The second thing is we might loan players directly [575] to clubs with whom they had no official affiliation and this, the terms, the conditions under which these arrangements are made are set out in this joint affiliation agreement.

Then there is another way in which we assist them in order to build up their own strength, and that is by a process called the reverse draft. This is the final draft which takes place each year and it works out this way: That although the National Hockey League member clubs may have a proprietary interest in a very, very large number of players, could easily have through arrangements with other affiliates, once per year our National Hockey League teams restrict themselves to a list of 37 players and every other player outside, that is owned or which the National Hockey League team has a proprietary interest in, is made available for claim by minor league clubs at half the normal draft price, in other words, at $15,000, and this is a very important part of their operations.

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[576] Q. Mr. Campbell, how many players suit up and are ready to play in a National Hockey League regular season game? A. A regular season game is sixteen players and two goal keepers.

Q. I believe Mr. Eagleson testified to a somewhat larger and varying number. Would you explain the difference? A. Yes; I can. I think so. This is a game in which there are a substantial number of injuries. They occur at unexpected

times, and sometimes the injuries are not of a character that would justify their being kept out of play for any great length of time. So rather than send—say, keep them around and—or send them to the minor leagues to play themselves back into condition, in which case they would have to stay a minimum of two weeks, what the club frequently does is that it carries those players just—with the rest of the team, and they work out, and they get treatment and so on, and eventually they get to practice with the team when they are back fit again or reasonably fit—maybe not fully fit to play in a regular league game, but they are kept around for this reason.

Q. But they are not qualified to play? A. Oh, no.

Q. They are in a supernumerary status? [577] A. Oh, no. They can only play if they are listed on the official roster for that game.

Q. And if they returned to the official roster, and that roster was already occupied by sixteen players and two goalies, one of those players would have to be removed; is that correct? A. That is correct.

Q. I believe you mentioned that thirty-seven players would be held in control or on the reserve list. If that a correct statement? A. This is correct. That is the—the present reserve list is a consolidation of what was previously—what were previously three lists. They used to be a player list of 30. There was a professional goal keepers' list of three and a negotiation list of four. Those—that's the thirty-seven that are considered to be untouchable—shall I put it that way—in the reverse draft.

Q. And that is thirty-seven as compared to an active group on the ice ready to play hockey of a total of eighteen? A. That's right, and it could include and probably would include all negotiation—all players designated as negotiation nominees would be amateurs, of course, and there cannot be more than four. There could be as many as three professional goal keepers, and included in the thirty- [578] seven might be some very high class amateur candidates, what we call unsigned draft choices.

last team in the standing drafts first and so forth up through the two leagues. The importance of this, free agent draft, was the effect that it promised to have and in my judgment is having dramatically on the equalization of talent from club to club within the major leagues. Baseball had not always been able to achieve an equalization. In the early history there was little or none. In the history, in the 1900's up to 1965, there was greater equalization of talent but by no means what was necessary ultimately to meet the competitive test that [691] the game is now faced with from all forms of entertainment that compete with it, and surely the Yankee domination through a good part of the '20's, '30's, '40's and '50's had not indicated any equalization had been achieved in the American League.

The importance of that, your Honor, is that if you are going to compete effectively in the entertainment field where we are, we must have this equalization in order that our races will be good, close, exciting races and we will draw the attention of our fans. This is what they want. This is what we should be committed to give them.

Inevitably this produces a healthy and, I hope, more profitable situation in major league baseball and is bound to benefit the players and the clubs and the fans alike.

We have the unrestricted major league—

Mr. Topkis: Excuse me. I hesitate to interrupt the witness but there is a small portion of his testimony, your Honor, that I would like to move to strike, and before it goes too far into history I would like to move to strike it.

As I heard the witness, he testified that in 1965 some players urged the adoption of the free agent draft. Since that is manifest hearsay and I can't cross examine the players, I would move that it be stricken. Just that small remark by the Commissioner.

[692] The Court: Did you hear Mr. Topkis?

Mr. Kramer: Yes, I did, and I am not sure. I would like to ask the witness before your Honor rules if he said that.

The Witness: I did.

The Court: What do you say?

Mr. Kramer: I would have to ask him more questions before I can decide.

The Court: All right, go ahead.

Q. What is the basis of your knowledge that players or some players asked for the free agent draft? A. Information that I have received in my office in the normal procedures of examining, planning procedures and so forth.

Q. Since you have been Commissioner? A. Yes.

Q. Who gave you this information? A. My staff people and the presidents of the two leagues.

Mr. Kramer: If your Honor please, I must confess that the presidents of the two leagues are going to be witnesses. It certainly is hearsay. And if Mr. Topkis wants to hold me to my fire, I suppose he has the right to.

The Court: It does you credit, and not at all [693] unexpected, Mr. Kramer.

Motion is granted. That segment is stricken.

The Witness: May I continue?

The Court: Yes, indeed.

The Witness: I was in the course of an answer.

A. (Continuing) The adoption of the unrestricted Rule 5 minor league draft which I have described was an important change since 1952, benefiting the upward movement of players and benefiting clubs, I might say, by permitting them to equalize playing strength as much as that rule would permit them to.

In 1964 a provision in the major league agreement was eliminated which, in my judgment, is quite important in this regard. It had theretofore been provided for many years, really since some time shortly after the death of Judge Landis, that the Commissioner of Baseball could not hold—carrying out his powers—that any major league rule was not in the best interests of baseball or was detrimental to baseball. He could not do that. That provision was eliminated in 1964 from the major league agreement and you will not find it there.

I think the implications of that speak for themselves.

During that period the effectiveness, in my judg- [694] ment, of the Major League Baseball Players Association has increased markedly. The Association came into existence, as I recollect it, in the early 1950's and thereafter they were guided by an attorney, J. Norman Lewis and by Judge Cannon of the Milwaukee County Court after Mr. Lewis.

In 1966, upon Mr. Cannon's going out of the picture, Mr. Miller came into the picture and in my judgment has done a strikingly effective job in representing the ballplayers and in obtaining significant economic gains for them, quite dramatically, I think, your Honor.

In 1966 he negotiated a new benefit plan which increased the annual club contribution from 2.6 million to 4.1 million. That was a two-year arrangement and when that expired he negotiated a three-year arrangement which increased the annual contribution from 4.1 million to 5.5 million.

He negotiated a new basic agreement, actually the first so-called basic agreement in 1968, which is an exhibit here, Feeney Exhibit F, which contains very significant benefits for the players, and he has negotiated a tentative agreement on a new basic agreement at this time which he puts the total dollar value as at $4 million.

So the presence of this Association has been an effective force, and particularly as it has improved, and [694a] Mr. Miller has, in my judgment, improved it in player representation and rights, and it is a significant change since 1952.

I would say those are the principal things that occur to me, Mr. Kramer.

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[709] Q. Mr. Kuhn, according to my records, you have had approximately 19½ years of experience in one capacity or another in organized baseball, is that right? A. Yes.

Q. My question to you is, and it can be answered yes or no, state to the Court whether or not in your opinion orga-

nized baseball could continue and function satisfactorily without the reserve system? A. In my opinion, it could not.

Q. What are the reasons for your opinion? A. The reasons, Mr. Kramer, are measured by the standards by which the necessity of the reserve clause must be measured. There are four of these, as I see it. One is to provide an equalization of team strength; another is to assure the growth of player and team strength and development; thirdly, the protection of the integrity and public acceptance of the game; and fourthly, the attraction of capital to the game so that it might operate.

Q. You have given us four reasons in brief for your opinion, and unless I am going to interrupt your train [710] of thought I would like to have you state your views in more detail with respect to each one of these factors. Had you completed your list? A. I had.

Q. Please explain how the integrity of the game has anything to do with the reserve system. A. I think I perhaps can shortcircuit that to some extent, Mr. Kramer, by referring to history.

The history, your Honor, which I have recited this morning of baseball without a reserve system—I am dealing with baseball without a reserve system—has demonstrated that it is impossible to maintain integrity of operations, it is impossible to, certainly as history advises us, it is impossible to maintain honesty among the clubs or players, and sure it is where such a situation exists that the public will reject what baseball offers.

The whole process of revolving and shifting and what has accompanied it leaves, in my judgment, no hope of the maintenance of integrity as is necessary for a professional sport to operate.

I have very much in mind, referring your Honor to the Celler Committee Report, the part which is in evidence here—that is Plaintiff's Exhibit 15A—the language appearing on Page 18, and if I may, your Honor, [711] I would like to read that to you.

The Court: Please do.

A. This is a statement by A. G. Mills included in this report, the man who originated the reserve rule.

"As now, each summer's campaign was planned during the preceding winter and the habit was general on the part of the clubs to take on obligations in the way of players' salaries that were not justified, as the spring games would inevitably demonstrate that the majority of such clubs could have no hope of winning even a respectable number of games. Moreover, this condition was greatly aggravated by the general practice on the part of the richer clubs, of stripping the weaker ones of their best playing talent. Then would follow the collapse of a number of these clubs in mid-season, leaving their players unpaid, while the winning clubs, owing to the disbandment of the weaker ones, would also frequently fail from inability to arrange a paying number of games.

"In such a condition of things, it was manifestly impossible to establish and maintain that discipline which is indispensable to success in every form of team contest, and the laxity of discipline was largely responsible for the grosser evils which were then rife, such as dissipation, gambling, and even in some cases selling of games."

[712] I think this sums up the problem presented in terms of integrity as well.

Q. I believe that another one of the considerations you mentioned as requiring the reserve system was the desirability or necessity of equalizing competition among the clubs. I take it you meant by that competition in the playing of the game, did you not? A. Yes.

Q. Do not the antitrust laws require businessmen to compete as hard as they can and take as much business away from their rivals as they can short of monopolization?

Mr. Topkis: Objection, your Honor, on the ground that this witness is being asked for a conclusion of law and while of course he is an attorney and, indeed, a distinguished one, I don't think your Honor needs advice from him on what the antitrust laws require.

The Court: You would be surprised. I learn all the time and I will take his answer.

The Witness: The answer to that question is yes.

[713] Q. Well, what would happen if such a rule were applied to organized baseball? A. Again, I think that history, your Honor, provides a clear answer. Unrestrained competition as we have in the marketplace applied to baseball would produce the evils which I believe I have described in the game where at the time we had unrestrained competition.

It is inevitable in a league, in a professional team sport that you must compete within the league. The clubs must compete with one another. This is critical. They must compete in trying to acquire the best players and in various other ways, but if they compete too vigorously against the other partners in the league and put them out of business, as history shows that men's instincts will lead them to do, then you have destroyed the league.

But the league must likewise have cooperation among its members in order to exist and be effective with the public. So you have the need both for keen if not fierce competition but also cooperation, which has the effect of limiting that competition in order to permit the various entities within the league to compete as successfully with one another as possible, in other words, to standardize the conditions of competition so that you can have equal competition and hopefully have good races, exciting to the [714] public, and therefore carry out your trust to the public.

Mr. Kramer: Excuse me just a minute, your Honor.

The Court: Surely.

Q. Have you had occasion to examine Plaintiff's Exhibit No. 7 in evidence in this case? A. What is that, Mr. Kramer?

Q. It's a document received in confidence, and it relates to club financing. A. The answer is yes.

Q. Do you have a copy of it? A. I do.

Q. When was the first time you examined Plaintiff's Exhibit 7? A. You showed it to me after it was in evidence.

Q. Based on the figures appearing in Plaintiff's Exhibit No. 7, state whether or not there has been a wide variance among the twenty-four major league clubs in profitability over the last five years.

Mr. Topkis: Objection, your Honor. I take it Plaintiff's Exhibit 7 speaks for itself. Your Honor can examine it. We would be delighted to have you do so.

Mr. Kramer: He is technically correct, your Honor. It was merely a foundation question.

The Court: I will allow it for that purpose.

[715] Will you repeat the question, please, Mr. Reporter.

(Question read.)

A. Yes.

Q. Now, I turn to the question of financial resources as distinguished from profitability, and I ask you whether or not there is a wide divergence of financial resources of the major league clubs, among the major league clubs. A. Yes.

Q. What accounts for this wide divergence in financial resources? A. Several things. The variations in profitability appearing on Plaintiff's Exhibit 7 indicate one reason. These variations occur because from club to club there is a great variation in the amount of gate receipts. That can be expected. The larger cities can regularly obtain greater gate attendance than the smaller cities with relatively equal teams.

The broadcast market, including radio and television, varies from city to city according to its size, and therefore the source of revenue here varies greatly from a city like New York to, let us say, a city like San Diego.

In addition, the principal operator of a club frequently has been responsible for loaning money to the club and permitting it to operate in a way that its normal [716] day-in-and-day-out P&L statement would not, so that the financial—the assets of the various operators play a significant part here.

By way of example, a man like Tom Yawkee of Boston Red Sox has put a great deal of money into the Red Sox

operation over the years, simply because he wants to have the Red Sox prevail and be good. This is not necessarily available in every club and depends, of course, upon the willingness of the operator to put up the money and whether he has it in the first place.

Q. What significance, if any, Mr. Kuhn, does this divergence in financial resources have in considering the workability of alternatives to the reserve system, concerning which there has been testimony by plaintiff and by Mr. Miller and Mr. Greenberg and I believe by Mr. Nathan. A. Well, the workability of any particular proposal can—in my judgment can be affected by the lack of evenness of financial strength among the clubs. One proposal may be more or less workable depending upon the strength of the clubs. In general, I think this is so. I am talking in a very general field here.

Q. Well, let us take a proposal that I believe was advanced by the plaintiff himself, that we simply do away with the reserve rule. What would the effect of that be, [717] in your opinion, in the light of the widely varying financial resources of the twenty-one clubs? A. I don't think there is the slightest question that the more well-to-do clubs would attract the star players and that the less well-to-do clubs would simply go out of business.

You certainly couldn't operate a league, in my judgment, Mr. Kramer. Something might evolve in the way of an exhibition business, like the Cincinnati Red Stockings of 1869 and '70. They were sufficiently advanced—financed to be able to travel around the country and play exhibition games with other teams and charge a gate price. They had some revenue and were able to break even that year. But that would be an exhibition business. It wouldn't be a league business.

Baseball as we know it simply could not survive that situation that you put in your question.

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[739] Q. At page 255, commencing at line 24, to line 16 of page 256, Mr. Miller testified concerning an alternative to today's reserve system. I am going to read his alternative to you, and then I am going to ask you what in your opinion would be the effect of that proposal on organized baseball. I quote:

"For example, we have suggested that instead of the club having an option on a player's services for life, that that option be for an agreed upon period of years, such a period of years to be his years in organized ball, in major league ball, and preferably in a combination of both of those; that at the end of such agreed upon period that a player for the first time in his whole career be given an opportunity to establish what his market value is by being permitted to talk with and obtain bids from other clubs.

[740] "We have discussed the possibility that even when he establishes his market value and obtains bids from other clubs, that it might be possible to have a rule that his own club could still retain him, simply by matching the bid that he received, and if the continuity of his employment with the club were that important, the club could obtain that continuity simply by matching the bid that the player had received."

That is the end of the quotation.

Now, Mr. Kuhn, what in your opinion would be the effect of that proposal if adopted, on organized baseball?

A. Let me say preliminarily, in answering that, that it has been my conviction and continuous practice, based upon my conviction, that the problems of the type presented on the reserve system as they arise between the players and clubs should be solved by the players and clubs in the formal course of collective bargaining and that the Commissioner of Baseball, carrying out the functions of his office, should not involve himself in the merits of those considerations and in the strategy of the parties relating to this type of problem.

Since October, when the present bargaining began, I have studiously adhered to that principle of mine, which I believe is a sound one. I have not expressed my views on these subjects, this type of subject to anyone, except to [741] my attorneys during the course of preparing for this testimony.

However, it seems to me that there comes a time in the course of litigation, which I did not bring and which I am responding to, where I am bound to express my views on these things, because the questions have been presented to this Court in part for decision.

As to Mr. Miller's proposal as contained in that language, it is a difficult proposal for me to address myself to because of the vagueness of the detail. It is a general idea only.

Addressing myself as best I can to the general idea and taking those standards, your Honor, which I mentioned this morning by which I would try to test a modification in the reserve system, I would say that in terms of integrity and the effect on integrity of the game, this has perils because inevitably it opens the door to a player dealing with another club while he is with a first club.

I understand that somehow or other in the mechanics they might try to prevent this, but the mechanics do not make it clear to me how this could be prevented, and it is an invitation to the avoidance of the tampering rule.

Any time a player comes to the end of a period of service and looks for another employer, the danger of impair- [742] ing the integrity of the game immediately emerges, and the opportunities are very widespread in our profession for that to happen, because our teams travel around the country, spend a number of days playing a stand in different cities as they travel on the road, which presents a considerable opportunity for tampering and for discussions, which could affect the integrity of the game or affect the appearance of the integrity of the game, which is just as important.

revolving. To the extent there were players on the roster who were not reserve, resolving continued, and to the extent there were competitive leagues, as there were throughout the various parts of the 1880's, revolving continued, regardless of the reserve system, from league to league.

Q. At page 229 of Plaintiff's Exhibit 15-A, the House Judiciary Committee, that is to say, the Subcommittee, expressed the opinion "Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even struggle."

Now, that report and that opinion was given in 1952. My question to you is, in your experience do you know of any-
[688] thing since 1952 that has arisen that would point to any feasible substitute for the reserve system viewed as a system to protect the integrity of the game or to guarantee a comparatively equal competitive struggle? A. No, I do not.

Q. What changes have occurred, if any, in organized baseball since 1952 that you think are pertinent in reaching the conclusion or conclusions, I should say, that you have reached?

Mr. Kramer: I would like to withdraw that question, if I may, your Honor.

The Court. Withdrawn.

Mr. Kramer: It may be too broad.

Q. Let's talk, at least first, about the changes in organized baseball since 1952 that have been made which in your opinion have benefitted the players. A. I would say there are a number, Mr. Kramer. In the first place, the Celler Report refers to and criticizes what it calls the ossification of the major league make-up. Up until 1952 and through 1952, the make-up of the leagues, the circuits in the leagues have remained unchanged since 1903, and clubs were largely confined to the northeast quadrant of the United States, St. Louis to Chicago to Boston to Washington.

[689] Commencing in 1953, perhaps significantly, baseball began to move into different geographic—into new

geographic areas. '53 was the first. There was movement of the Boston Braves to Milwaukee, and it was followed in '58 by the movement of the Giants and Dodgers to San Francisco and Los Angeles.

We had move from St. Louis to Baltimore, the move from Philadelphia to Kansas City.

You had expansion in 1961, in 1962, which brought, in effect, Minnesota into major league baseball, an American League team in Los Angeles, a National League team in Houston.

You had a further expansion in 1969 which brought four new teams into major league baseball, the Montreal Expos, the San Diego Padres in the National League, and the Seattle Pilots and Kansas City Royals into the American, as part of which the existing club in Kansas City became the Oakland Athletics, and which had been further affected by the transfer of the Pilots to Milwaukee.

But the effect of all of this has been to increase not only the geographic areas in which the game is played—incidentally, I have not mentioned the inclusion of Atlanta in the National League, which brought in the southeast territory—but it has expanded the number of major league teams from sixteen to twenty-four, which means that vast [690] new opportunities for players in the major leagues have been created and at least a long term potential for a more profitable operation of the clubs has been created by reason of expansion into new territories.

I think this has been beneficial to everyone in baseball.

We had the adoption in 1965 of the free agent draft which is Major League Rule 4, contained in Plaintiff's Exhibit 6, appearing at 518, and so forth, of that exhibit, your Honor.

The effect of Major League Rule 4, the adoption of which had been very much encouraged by most of the clubs in baseball and many of the players, was to permit the clubs to draft free agent players who had never signed a professional contract under a draft system, whereby the

—and that is all he could take, just one teams—these two, the effect could be devastating, just these two players.

And it also overlooks—it could be devastating in unbalancing competition, is what I am trying to say. It also overlooks that while you might limit the number of players any one team could take, it does not limit the number that could be taken from any team, and this could destroy a given team if enough of its players reached the point of free agency over a period of several years.

Q. All right. Mr. Miller made a second and quite different proposal at page 257, lines 6 to 11 of the transcript, and I would like to read his exact words to you.

"We have suggested the possibility of a salary [746] progression year by year, a minimum salary progression, that would have as its purpose making it too expensive for a club to pay that kind of a salary and option a recipient to the minors and keep him on the bench and thereby encourage him to move to a club were his talents could be utilized."

Do you understand Mr. Miller's proposal as I have read it?

The Witness: I would like to have the question read.

The Court: Certainly.

Mr. Court Reporter, would you read the question—or perhaps you can give the transcript to the witness and let him see it. Suppose you do that, Mr. Kramer. Take your time. A. The answer to the question is yes, I generally understand the proposal.

Q. What effect, in your opinion, would that proposal have if adopted, on organized baseball? A. Primarily would like to say that the proposal, again, is a generalized one. It says "year by year" without indicating how frequently those levels of minimums would occur, if you understand what I mean, your Honor. It might be every five years or two years or year. I'm not sure from this question what it means, so it has the question of mechanics built into it.

[747] However, again applying my standards to this, in terms of integrity of the game, I do not see that it would present any problem. We have a minimum salary now, not one on levels but one which everybody must receive at least.

I do not see that that presents any problem of integrity, nor do I see that this proposal, as I generally understand it, would present any problem of integrity.

With respect to economics, you would have to put some dollar figures in here before I could comment on economics. Again, this is a typical bargaining problem. If there were some dollar figures, I think the clubs and players could look at it and perhaps reach some conclusions as to whether or not it was economically workable.

In terms of mechanics, you come to the point where a player becomes a free agent if he doesn't receive this minimum. If it is as simple as that, it might not have a mechanical problem, but there may be some mechanical difficulties there that I just don't see. On the face of it, I don't see severe mechanical problems.

In terms of equalization of team strength, I would be inclined to think it beneficial.

Q. All right. Mr. Miller made a third proposal, and why don't you follow with me, Mr. Kuhn, in the transcript? It is at page 257, lines 12 to 14 and 22 to 23.

[748] He said: "The Players' Association had suggested the possibility of reserving less than the number of players now reserved. The number of players now reserved far exceed the active roster."

Skipping a few lines: "It is conceivable to have a maximum reservation list which is less than the active roster."

Do you understand that proposal as I have read it, Mr. Commissioner? A. I have a general grasp of the idea. I don't have a very specific one, because, again, it is unspecific in its details. But in that sense, yes.

[749] Q. What would the effect be on organized baseball, in your opinion, if a proposal such as that I have just read

from Mr. Miller were implemented and put into effect? A. I think I have to break it into two parts, your Honor, because it looks to me like a proposal possibly to reduce the overall reserve of 40 in some amount and possibly to reduce the active player limit in some way or perhaps to reduce the overall reservation under the active limit, which is 25. Taking those two possibilities, if it is intended to be a suggestion for some possibility in the reduction of 40, let's say 37 or 38, I would find no problem from an integrity point of view, I would find no problem from an equalization of talent point of view. From an economic point of view it troubles me somewhat. Obviously the existing reservation possibility of 40 induces an investor, a club operator, to invest more money in player development. The more he can protect the more he is going to invest, in my judgment; the less, the less. So there is a danger if that amount is reduced, the investment is reduced by reason of the overall reservation being reduced, that there would be less development of players. This would have an impact not only in the major leagues because it would result in less players, but in the minor leagues [750] where you would lose some minor leagues. In my judgment, with a reduction down to 37 or 38 you might lose some minor leagues.

In terms of its mechanical workability, I would say it is just as mechanically workable as the present system. If the overall reservation that you can make on November 15 under Rule 4A is to be less than 25, why, I would have to say that econonically it would be a disaster. Just taking everything I said before and multiplying it in terms of economies, it is an economic disaster.

In other respects it might be workable, but again you get into these economic areas, Mr. Kramer, and I think you are faced with a bargaining problem in a context not just of one change but of many changes such as are involved in the present package which hopefully is close to conclusion involving many features which are not directly reserve system features. What is fair to be expended, your Honor, to

solve a bargaining problem takes into consideration not only the reserve system but all the other elements that are open in the bargaining and what has been conceded and what is has cost—Mr. Miller says $4 million—and what is the economic impact of going further. This is what has to be worked out in bargaining. I think it is very difficult to work it out any other way.

[751] Q. You spoke very near the end of your last answer about the package and $4 million, and I am not sure I understood your answer, and while it may sound arrogant, that means it is possible somebody else didn't understand your answer. A. I was merely repeating something I said this morning. The price put on the increases in the tentatively negotiated current package by Mr. Miller is $4 million worth of increases.

Q. You are referring now to bargaining negotiations that are now in progress? A. And have been tentatively concluded by the bargaining teams, as I understand it.

Q. Mr. Miller made, in the transcript of this trial, a final proposal or I should say perhaps a last proposal. The answer at Page 257, Lines 23 and 24. He said:

"We have discussed the possiblity of competitive leagues."

Do you understand what Mr. Miller meant by that proposal? A. I believe I do.

Q. What is your understanding? A. My understanding would be a reversion to a system such as existed in 1900 when the American League and the National League were separate, competitive leagues, not [752] organized under a national agreement.

Q. What would the effect be of having separate competitive leagues, specifically, the National League and the American League, on organized baseball, in your opinion? A. I think very simply it would destroy the game as it now exists, as history has demonstrated it has in the past when such a condition has existed.

Q. At Page 258, Lines 4 through 9, Mr. Miller said that the Players Association had "suggested the possibility that in any period when the owners have control over the player's professional life, that there be a system for resolving impartially a legitimate salary dispute rather than have that salary named unilaterally by the club which controls the player's services."

What, in your opinion, would be the effect on organized baseball if it were to adopt a system or resolve impartially a salary dispute between club or clubs and player or players? A. Applying my standards to that, I don't see that it would have any effect on equalization of team strength. I don't see that it—I am addressing myself to economics—I don't know what the economic effect would be. My guess is it would not have a significant economic effect. I could be wrong.

[753] As to workability, it troubles me because my opinion is that it might result in a great many arbitrations, which could become awkward as you try to move a game along and play up to a point where you can play.

As to integrity, I don't think it would present a problem of integrity in the normal sense, but broadening that idea out, I am troubled as to the effect it would have on player-club relations. In my judgment, players and clubs as a group and individually should resolve their problems within their own bargaining system. I think it is important that a player and a club solve their own salary problem with respect to that player. I do not believe for a second that the player is left with only the offer presented by the club. I think demonstrably players have repeatedly bargained higher figures out of clubs than the first figure offered. So that I am concerned with the effect it would have on player-club relations.

What baseball needs is improved player-club relations, an ability to work out problems among themselves, and to my way of thinking this would put a cold-blooded impartial element in the relationship that would be harmful, not

helpful, to the relationship, and on that ground it would trouble me very much.

Q. Now, if I may, Mr. Kuhn, I am going to go to [754] Mr. Greenberg's suggestions, and, as I analyzed them, two. I shall read them to you separately.

He testified commencing on Page 237, Line 25 and carrying over to Page 238, Line 10, as follows:

Do you have that before you? A. I do not.

(Mr. Kramer hands transcript to witness.)

Q. "I think the game needs a new image and the first way to get a new image is eliminate the reserve clause in the present contract, and then I think it would be very easy to come up with some kind of an agreement, a contract for a term of years, in which the club had rights to protect its interests in the players during the development stages, and certainly if a club, after X number of years, five years—let's presume it would be five years—if it can't develop an esprit de corps between the players and the club, then the player ought to leave the club and go somewhere else."

Do you think you understand Mr. Greenberg's proposal? A. In general I believe I do.

Q. What would the effect of that proposal be, in your opinion, on organized baseball? A. I think if you look back or think back to my [755] prior answers, Mr. Kramer, you will see that I have addressed myself to this very idea in my prior answers. I think I have dealt with it.

Q. I think you have, too.

The Court: I think, nevertheless, you had better sum it up. If not go into as much explanation as you did at the time you first answered it.

A. Under that arrangement, essentially a player would become a free agent after five years or some other period of years which would protect the investment of the club. It is a difficult thing to deal with. It is an alternative to start with. Taking it as a five-year proposal, I think on integrity it would be very bad because you have the problem of a

player dealing with other clubs at the conclusion of his term of service with the first club, and this will always present a question of integrity, in my judgment.

On economics, the economic effect could be considerable. I think this is a bargaining problem.

On equalization of team strength, I think it would be devastating.

On mechanics, it probably has some mechanical problems but that would be the least. That would tend to be less severe than the other problems presented.

[756] Mr. Kramer: Would your Honor excuse me just one moment?

The Court: Certainly. Take your time.

(Pause.)

Q. Mr. Greenberg, if I understood him correctly, made a proposal on Page 248, Lines 13 through 19, which I would now like to read to you.

He said he would "prefer the owners of their own volition would change the system. He said they should do it themselves instead of having to take it to court or having to take it to the Players Association and work it out that way.

Mr. Greenberg emphasized that this was his personal opinion.

In your opinion, if changes are to be made in the reserve system, how should those changes be made? A. They should be made by clearly, in my opinion, bargaining between the players and the clubs. I do not believe they should be made or that they can be made unilaterally by the clubs. We are dealing here with terms and conditions of the players' employment. So the change should be made in bargaining.

I feel that the reference to court litigation points up a misfortune in the present bargaining context.

[757] It has been my stated opinion repeatedly that the decision of the Players Association to back Mr. Flood's litigation here was a serious mistake on their part. This deci-

sion was made as long ago as their San Juan meeting in the first half of December, 1969, and to think that they were seriously embarking on realistic negotiations to find a solution when they had committed themselves to litigation is nonsense, in my judgment. They had not. And, indeed, when they effectuated their determination at San Juan by bringing this litigation in the middle of January, it quickly resulted in the Players Association and the clubs bargaining team working out an arrangement whereby they simply put the reserve system question up on the shelf and thereafter ceased, so far as I can determine, to bargain on the subject.

Therefore, I think the Players Association made a serious mistake in its position.

Mr. Flood is something else again. He is perfectly free to sue anybody he wants. I don't criticize him for doing it or not as he sees fit. I criticize the Players Association. I criticize them further for the kind of proposal which is presented here in Mr. Miller's testimony. The proposals are all round, undefined and interrelated by Mr. Miller's testimony, as I heard it. He [758] didn't say any one of these generalized proposals was the thing he was presenting. He said it is some combination of these. So it has a double fault. You don't know what he is presenting because it is a combination of several things, and in its individual elements it is imprecise. Time and again these proposals are imprecise.

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[765] Q. Now, Commissioner, so far as the integrity point is concerned, you said you were concerned about tampering during the season; is that right? A. Yes.

Q. Well, football has that problem, doesn't it? A. I assume so. I don't know.

Q. And yet you—

Mr. Topkis: Withdrawn.

Q. Well, if a football player becomes free to negotiate with another team only at the end of the season and an-

other team tried to tamper with him before the season ended, that would be the same problem that you would be concerned with in baseball, isnt' it? A. Taking those facts to be correct, yes.

Q. And yet you stand by your testimony that so far as you know football's level of integrity is not different from baseball's; neither is higher than the other? A. That's correct.

Q. Now, do you have any opinion, Commissioner, on whether there is an equality of competition or a tendency in that direction among professional football teams, or don't you profess expertise in that area? A. I have the opinion of a fan.

Q. And what is that? [766] A. That there is a tendency toward equality of teams.

Q. Approximately equaling that among baseball teams? A. Yes.

Q. Yet you fear that were there to be the adoption by baseball of football's player option rule, the impact on baseball would be bad in terms of equal competition on the field. A. Yes; I do. There is a difference between these sports.

Q. Will you tell us what that difference is, please? A. In football there is one particularly key player, the quarterback. In baseball there are more key players. You can lose one football guard, one tackle, one blocking back and replace him. You cannot replace the quarterback.

In baseball you have a number of players who may be essentially irreplaceable in terms of their quality. You look at the Baltimore Orioles, for instance, and try to replace that team position by position. You couldn't do it. So if you lose several players there, you may be vastly hurt beyond what would happen if a football team lost a tackle.

If you lost a pitcher, one pitcher, if you lost a Tom Seaver, these problems of team balance within a team and the experience of a team playing together and developing [767] team work and then to have it broken up by the loss

of a key shortshop who works so beautifully with the second baseman and the third baseman in the infield and has his signals worked out with the catcher and the pitcher in terms of pick-off and so forth—if you take several players from that, you can devastate a baseball team.

Q. Well, if you took several players from the Jets or Joe Namath alone, you wouldn't think much of the Jets' chances in the coming season? A. I think they would do quite well.

Q. You are not a betting man, Commissioner? A. No; I'm not.

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[797] Q. Well, today a player can be traded in the off season, can't he? A. Yes.

Q. And I take it that in today's system that is not regarded by you, those trades are not regarded by you as having a detrimental effect on the integrity of the game. A. If you are asking me whether off season trades have a detrimental effect on the integrity of the game, the answer is no, they do not. Quite the contrary.

Q. And wouldn't that be true whether the player had a veto over a trade or not? A. The answer I just gave you is yes, it would be true.

Q. Very well. A. But the morale problem remains, whether it is in season or out of season.

Q. Well, please tell me how it is that morale would be affected more under a system where the player had a veto over an off season trade after five years than it is affected today when a player can be traded without his consent after five years or at any other time? A. The problem presented by leaking news of a trade [798] that isn't made is where the morale problem arises.

The Court: Would you go into that, please, Commissioner? Explain that.

The Witness: Yes. If, let us say, a trade involving six ballplayers, like the Ken Harrelson trade, were inhibited by a consent provision, it is inevitable, in my judgment,

On workability, I have indicated that the mechanics are simply not stated in Mr. Miller's proposal. He doesn't suggest how many years. He suggests that some period of years, and it is a little difficult for me to address myself to mechanics.

I think this is the kind of thing that can be worked out in bargaining, if it can be worked out at all.

In terms of equality of competition, I am afraid that this would have an adverse effect, because the richer teams would tend to sign up the players who became available under such a free agency arrangement.

In terms of the economic effect, I think the economic effect could be serious if as a result of this the stronger teams financially attracted the players, your Honor, leaving the weaker teams to flounder and possibly perish financially, but basically this is the kind of question that in my judgment [743] can be resolved, if it can be resolved at all, in bargaining.

Q. Mr. Nathan is his testimony at pages 412 and 413 suggested that each club could have an exclusive option with the player for five years, and at the end of that time —if we understood him—the player would become a free agent.

What would the effect of that proposal on organized baseball be, and in your answer I don't think it is necessary, unless you wish to, to repeat what you said about the first proposal I read to you. A. Well, the observation I made on integrity applies to this suggestion.

Whether it has problems in mechanics is difficult to tell. It really isn't suggested in a mechanical context that I can deal with.

He says, after five years he can be a free agent. If that is what it was, the mechanical problem is probably not serious. He simply becomes a free agent, and he is available to go out and sell his services as best he can. So the mechanical problem might not be serious.

On equality of teams, it has the same problem as I answered precedingly.

And on economics it presents the problem that I mentioned on the prior answer on economics, it seems to me.

The particular difficulty which has to be observed [744] here in the economic area is something which I have testified to during the course of the day, and that is the investment made in the development of players by the major league clubs, and until the player has reached the major leagues, there is no benefit from that investment whatsoever.

So that in order for the clubs to reasonably benefit from their investment, there would have to be some period, in my judgment, longer than five years of professional service and longer than five years of major league service, just on that narrow point alone, laying aside the questions of integrity and so forth.

Q. Now, Mr. Miller, at transcript page 256, lines 21 to 24, went on with the proposal that I have read to you, with the further modification that I would now like to read to you:

He says that the Players' Association had suggested a modification by which it would be agreed that no one club or two or three or four could sign more than X number of such free agents in any given period of time, thereby preventing any domination of all the talent by a club or a group of clubs.

In your opinion, is this modification of what I would call the Miller proposal No. 1—does it solve any or all of the problems you saw with the first Miller [745] proposal? A. I think, Mr. Kramer, it would help somewhat, but it does not basically overcome the objections.

Specifically, on the mechanics of this it would mean if a club would acquire only a limited number of free agents, it would mean that the free agents still might be Willie McCovey and Tom Seaver, players of incalculable value, who have been developed at considerable cost to their present teams.

Now, if these two players only were taken by one team

your Honor, that the news that would get out, even though the trade did not go through because of the consent provision, and the effect of that would be deleterious on the morale of the players who found out that their teams were trying to trade them to another team.

Q. Oh, so your problem is that you are afraid you couldn't trust the players to keep the secret, is that right? A. There is a problem in keeping any kind of a secret in baseball, whether it involves players or anybody else, Mr. Topkis.

Q. But today you let the clubs keep the secrets but not the players? A. There is no great confidentiality in many of the club deals as well. I think there would be less if there were more people involved, and the example that is very current is that of the 'Cincinnati Royals' attempted trade of player Robertson to Baltimore, where morale problems certainly erupted.

[799] Q. Well, is it your testimony, Commissioner, that it is appropriate to purchase integrity of the game at the price of denying a five-year player a veto, but you are willing to take whatever consequences flow from having the clubs know about the trades they make today? A. May I hear that question?

The Court: Surely. Would you read it, please, Mr. Reporter.

(Question read.)

A. I don't understand the question.

Q. I will try again, Commissioner.

As I understand your testimony, the situation today is that only the clubs know about trades that they are negotiating or have consummated until they are publicly announced, isn't that right? A. Correct.

Q. And on occasion the clubs leak that information and that hurts the moral of the players. A. On occasion, yes.

Q. And your fear— A. Let me put it this way; on occasion it has leaked.

Q. On occasion it has leaked, and the only custodians of the information are clubs when they are negotiating. A. That's correct.

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[805] Q. Mr. Kuhn, your firm appeared before the Celler Committee in the early 1950's, didn't it? A. Yes.

Q. Mr. Hughes was counsel there? A. Yes, I believe so.

Q. And Mr. Carroll? A. Yes, I believe so.

Q. And yourself? A. No.

Q. You didn't participate? A. No.

Q. But the firm did, and its appearance was noted on the record? A. I believe so.

Q. And the firm took the position there that the legality of the reserve clause, under the antitrust laws, would and should be tested by the rule of reason, didn't it? A. I believe so.

Q. You take that same position today, of course. A. I do.

Q. And is it your position, Commissioner, that not the [806] slightest deviation from the reserve system as it operates today is feasible without destroying the operation of baseball as it exists today? A. Can I hear the question?

The Court: Yes. Mr. Reporter, would you please.

(Question read.)

A. It is not my position.

Q. What changes could be made without destroying baseball as it exists today? A. Obviously the changes that could be made are changes that are best bagained out between parties that are involved here, such as the clubs and the players. Those are the parties who are involved. However, the reserve system, Mr. Topkis, has evolved over the years. There have been many changes in the reserve system, changes in the workings of the waiver rule, changes in the workings of the option provision, changes in the workings of the minimum salary provisions and so forth.

The reserve system has been an evolving system, and I expect it to continue to be an evolving system.

In the present negotiations, where we have tentative agreement, there have been changes in the minimum salary. It has been raised from 10,000 to 12,000 in the first year, and so forth, increasing in subsequent years. There have [806a] been changes tentatively agreed on in the termination pay, in the event a man is terminated, so all of these things are changes in the reserve system, and I can expect and would expect that this kind of thing would continue if the parties are permitted to use their normal bargaining positions to accomplish their goal.

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[810] Q. Let's take just one, Commissioner. How about compulsory arbitration of the players' salaries; would that be fatal to the structure and operation of baseball today? A. It would not.

Q. And how about giving the player a right to play out his option as is done in professional football; would that be fatal to the operation of professional baseball today? A. I believe it would be very damaging to the operation of professional baseball.

Q. Do you believe professional baseball could survive? A. It would depend on the degree to which the public view of the integrity of the game was that the game had become rife with tampering, that sort of thing. I couldn't judge that as I sit here. Sure I am that the public attitude would be that tampering would be inevitable in such a situation, and I am equally sure that that would have an [811] adverse effect on the game. It would depend a great deal, Mr. Topkis, on the number of players who might move under those circumstances, and so forth.

Q. You were in court when Commissioner Rozelle testified? A. Yes.

Q. You heard him testify that about fifteen players a year play out their option in professional football? A. I don't understand the question.

Mr. Kramer: Objection.

The Court: He didn't understand the question.

Reframe it.

Q. Did you hear Commissioner Rozelle testify that approximately fifteen professional football players per year play out their options? A. I heard him say something about ten in the past year. I didn't hear the word "fifteen" used, no, I did not.

Q. Would you take my assurance that that was the figure? A. I don't recall it.

Q. I will look it up, if you want.

Mr. Kramer and Mr. Gitter advise me that it was ten. My assurance would have been unwarranted and you [812] would have been wise not to take it. A. I suspected it was.

Q. All right. What is there about professional baseball that makes you think that more than ten professional ballplayers would play out their option per year, or don't you think so? A. Well, I haven't said that. I think you are assuming something that I haven't said.

Q. What is there about professional baseball that makes you think that the public would expect tampering in professional baseball when apparently there is none in professional football? A. I have never said there is none in professional football.

Q. Do you believe that the public regards professional football as lacking in integrity because there is tampering? A. I believe that when you have a system such as—

Q. Would you answer that question yes or no, please?

The Witness: May I hear the question?

The Court: Surely.

Would you repeat it, Mr. Court Reporter?

(Question read.)

A. I think it is inescapable that a certain element of that— [813] Q. Could I have a yes or no answer to that, please? A. I can not answer it yes or no.

The Court: Answer it your own way.

A. I think it inevitable where you have a system such as professional football used that there is going to be a danger that the public will fear tampering and, indeed, has feared tampering.

Q. And you want baseball to be freer of that danger than football, is that right? A. I want baseball to be free of any danger of that kind.

Q. At no matter what cost to the players? A. No, sir.

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[817] Q. Commissioner, if I may read to you from the Celler Report. A. Would you give me a page?

Q. 109, Commissioner, reading to you from Page 109.

"Since the adoption of the first reserve rule in September 1879, the share of major-league clubs' expenses going for team salaries has exhibited a continual decline. In 1874, the Boston Red Stockings spent 59.5 per cent of their expenses for team salaries. This increased steadily to 68 per cent by 1878, dropped to 54 per cent in 1880, the first year the reserve rule was in force. The Philadelphia Phillies spent 54 per cent of their 1885 expenses for team salaries.

"By 1929, however, team salaries accounted for only 35.3 per cent of major-league expenses. This share has continued to drop, reaching 32.4 per cent in 1939, 28.9 per cent in 1943, 24.8 per cent in 1946, and 22.1 per cent in 1950."

[818] You recall that statement, Commissioner? A. I see it. I don't recall it. No.

Q. You don't challenge it? A. Do I challenge those figures?

Q. Yes. A. I don't challenge the exact figures, no.

Q. Commissioner, what proportion of major league expenses today is accounted for by players' salaries? A. When you say "salaries," have you switched to "salaries" from "compensation"?

Q. No, I meant compensation. A. I would say the percentage today is something in the neighborhood of 25 per cent. I really am not sure but it is something in that neighborhood.

Q. I think, Commissioner, that the data produced to us by your counsel reveals the figure 19.4 per cent.

Mr. Kramer: I object to that, because I have produced no data.

Mr. Topkis: Excuse me. By counsel for the other defendants, then.

Q. Would that figure strike you as appropriate? A. If that is what the data shows, Mr. Topkis, I certainly wouldn't quarrel with it.

[819] Mr. Topkis: A moment, if I may, your Honor.

The Court: Yes, indeed.

Q. Pardon me, Commissioner. I inadvertently misled you. The 19.4 per cent was a five-year summary figure for the last five years. The 1969 figure was 21.5 per cent.

The Witness: May I explain my answer, your Honor?

The Court: Yes, indeed. A. If you look at the totality of salaries in which major league clubs are involved, I am sure you will find it is higher than that figure. You are dealing only with major league salaries in the present system, where you have owned and controlled minor league clubs.

Of course, the amount of money going to professional baseball salaries is higher than the figure you are using by a considerable amount.

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[822] Q. Now, Commissioner, do you suggest to this Court that the operations of a club or of a league made up of clubs one of which grossed $39,582.84, eighty-odd years ago, is a reliable guide to how a business with one hundred times those revenues might behave eighty years later? A. I do.

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[878] Q. The game would not be adversely affected, would it, if gate receipts were split 50-50 between home and visiting teams? A. It is a hard question, Mr. Topkis. I really don't know how to answer it.

Q. I do my best. Can you think of any way in which the game would be adversely affected by the clubs splitting gate receipts 50-50? A. Yes, I can.

Q. Tell the Court. A. The investments that have been made on the basis of the present system, so you have a problem there. You have contract problems. You would have to do it by a vote of the league. You would have to see what the league provisions are, whether it could be accomplished under the league constitution. I just don't have those in mind, but you certainly could have problems for the game presented by the process of trying to do this.

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[879] Q. And how about radio and television revenues? Suppose they were put into a common fund as professional football does with the exception of post-season games. Would the level of play and the vigor of competition on the field be adversely affected? [880] A. Again, you come back to the problem of the conditions under which investments were made, and this permeates both of these questions you are asking. If you are trying to attract capital under certain conditions and you change those conditions, you may create some problems which could have a definite effect on the way the game is played and the effectiveness of the game on the field and the level of competition and so forth. It is difficult to answer it because of those preliminary problems that you run into. You do have legal obstacles that exist.

Q. But you couldn't be sure whether there would be any adverse impact on the game? A. I couldn't be sure.

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[882] Q. Commissioner, have you at any time made any study yourself of possible alternatives to the reserve system in its present form? A. In my mind, yes.

[883] Q. But never any formal inquiry? A. No, sir.

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[898] Q. Now, when Seattle entered the league, what was the price that was paid for that franchise? A. Something in excess of $5 million, as I recall, for the entire set of rights that the new operators got there.

Q. And the Seattle Club operated during the one year that it operated in Seattle at a dollar loss, did it not? A. At a loss?

Q. At a dollar loss, yes. A. I believe so, yes.

Q. And the very next year the franchise was sold? A. The franchise was transferred this year by order of the Bankruptcy Court in Seattle.

Q. Do you happen to know the price at which it was transferred? A. I do not.

Q. Do you have any idea of that price? A. My best recollection is somewhere between 10 and 11 million dollars.

[906] Q. Commissioner, you have testified, I think that one of the purposes of the reserve system is to equalize competition on the field. A. Yes, sir.

Q. In your judgment, has that objective been achieved? A. Not perfectly, but it has moved the overall game of baseball in that direction.

Q. According to my calculations, Commissioner, of the one hundred major league pennants during the fifty-year period beginning 1920 and ending 1969, four teams have won on a total of sixty-three occasions.

Do you regard that as compatible with your belief that the reserve system has equalized competition on the playing field? A. I did not say that it has equalized competition, Mr. Topkis.

Q. Well, do you regard it as compatible with your belief, whatever your belief may be? A. That it tends to equalize competition?

Q. Yes. A. Yes. It is compatible, and you will also find that in the last several—certainly in the last decade that this concentration of winners has dimished, and that this has been a result of further modifications in the [907] reserve system, such as the free agent draft, which have made it possible for more teams to develop strength.

Q. You think that is the result of the adoption of the free agent draft? A. Along with the reserve system and the other aspects of the systems of organized baseball which lend to this.

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Charles S. Feeney

[963] Direct Examination By Mr. Hughes:

Q. Mr. Feeney, you have told us what your understanding of the reserve system is. Based upon your experience, in your opinion are these provisions that you reviewed for us necessary to the effective operation of organized baseball? A. Yes, they are.

Q. And while you are about it, what are the objectives to be achieved by this series of rules and regulations? A. Well, one of the objectives is to preserve the integrity of the game. By that I mean if, for example, a player was going to be a free agent of his own volition at the end of the season, and in the heat of the pennant race made a costly error which cost his team a game and the pennant, and then the next spring appeared on that other team even though the error was made inadvertently, I think public confidence would be shattered. This is one of the reasons.

The other, another reason is to even competition. [964] If a player of his own volition could become a free agent at the end of a season, the more wealthy teams in the big leagues would obviously have an advantage in signing him, which would eventually break down the competition in baseball. If the competition broke down far enough, it would probably mean that the weaker teams would no longer be able to compete financially and probably might go bankrupt.

It is also an inducament for people to invest large sums of money both in baseball and in the farm system. If these investments were not made in the farm system, to bring along baseball players to play in the big leagues, one, we would lose the talent that is coming in, and two, the minor

leagues, as we know them, would probably cease to exist and towns now that have baseball teams would no longer have them because the minor leagues would be te first to go under if this system of bringing baseball players along, which the major leagues are subsidizing, was not continued.

Q. You have sopken about player development. How about team development? A. Well, by player development I meant team development. You have got to obviously bring the players along to make your major league ball clubs.

Q. Now, Mr. Feeney, did these provisions of the system as you have described it achieve these objectives, in your [965] opinion, with reasonable regard for the accommodation of the rights of the club, the player and the interests of the fans? A. Yes, I believe they do.

Q. And were you here when Commissioner Kuhn testified concerning the reserve system and the reasons for it? A. Yes, I was.

Mr. Hughes: Your Honor, without going through this whole rigamrole again, I was going to ask:

Q. Do you agree with his testimony and his explanation?

The Court: If I may interrupt, it is quite generally understood that when the question is asked, "Were you here when so and so testified," you are not only trying to get an answer that the witness was actualy physicaly in the courtroom, but it carries with it the implication that he heard everything.

Mr. Hughes: I agree.

The Court: Therefore, if you are going to put the question that you propose, I would recommend that you first get from the witness whether he heard every question and heard every answer.

Q. Were you following the Commissioner's testimony? A. Yes, with interest.

Q. And did you hear what he had to say concerning the reserve system and the reason why he thought it was necessary [966] to the operation of organized baseball? A. Yes, I did.

Q. Do you agree with this reason? A. Yes, I do.

Q. Do you have anything to add to what he said?

The Court: On that score.

The Witness: Yes.

The Court: On that score.

Q. On that score. A. I think my earlier answer on the reasons will speak for itself. However, I do feel that as far as my experience is concerned, that I would like to maybe emphasize this again, that the negotiations between the players and the clubs are very real negotiations. The club needs the player just as much as the player needs the club. You really have no idea how much, what the need is for a second baseman, or a right fielder or whatever the play is, and so the negotiations are really very real negotiations.

Mr. Hughes: Your Honor, could we take a break at this time?

The Court: We are going to take a recess for a few minutes and, gentlemen, I would like you to carry on to at least 1 o'clock. I have another engagement that I must take care of, and we won't be able to continue until 2:45 [967] so let's go forward until 1 o'clock or a little after 1, whichever suits your convenience and then we will resume at 2:45.

Will you announce a short recess.

The Clerk: Short recess. All rise.

(Recess.)

The Court: Please proceed.

By Mr. Hughes:

Q. Mr. Feeney, were you in court when Mr. Miller testified as a witness for the plaintiff? A. Yes, I was.

Q. Did you hear his testimony? A. Yes, I did.

Q. And do you recall his testimony in which he discussed various proposals for changes in the reserve system? A. Yes.

Q. Do you recall one of his proposals was, in substance, that a club should have the right to a player's services for

a period of some specified years instead of for his entire career, and that the player should then have a right to negotiate with any club, but with the proviso that the original club would have a first refusal, that is, an opportunity to meet the bid of the best bidder for the player's services; do you remember his testifying to that general effect? A. Yes.

[968] Q. What in your opinion would be the effect of such a rule on organized baseball? A. Well, this is actually just what amounts to a watered down version of everybody being a free agent. For example, in 1970, in the National League, there will be 23 players that will become eight-year men, and I don't know what the figure is in the American League, but I would imagine it is in that area. From a point of view of integrity, the same rule would apply, that if one of these men, if the public knew one of these men could be free of his own volition and he appeared on a competing team that defeated his team the next year, you would have that problem, and you would also have the problem of loss competition because the difference between a really great team, a team that would win the great preponderance of the games, could be only one or two or three players. If they signed three of these players, say the Mets who were obviously in a better position to sign a player than say, San Diego, the Mets are going to draw two million people; San Diego is going to draw seven hundred, eight hundred thousand, hopefully more; so it would have the same effect on competition as we indicated earlier, if everybody were a free agent.

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[969] Q. This suggestion contemplates a period of some period of years when a player would have this freedom to negotiate. In the National League—let's take a period of eight years, for example—in the National League how many players would reach the status of being in the League for eight years in the 1970 season? A. I already indicated there are 23.

Q. From the standpoint of the players themselves, what

about the player who offers his services to the other clubs after this assumed period and nobody wants him? What is his status? A. I wouldn't—if he wanted to leave his club and then came back, I don't think he'd be in as good a position as if he were going to negotiate his contract originally. That would be my guess. Of course, it never happened.

Q. Mr. Miller also testified, and I quote, and this is Page 256, your Honor:

". . . it would also be possible to prevent the so-called wealthiest club from garnering all the talent by establishing a system that is not perfect but obviously better than the present one and agree that no one club or three or four could sign more than X number of such free agents in any given period of time, thereby preventing [970]any domination of all the talent by a club or a group of clubs."

In your opinion, what would be the effect of such a proposal, having in mind these four objectives that you told us are the objectives to achieve in organized baseball? A. I frankly don't understand that proposal as clearly as I might. I will try to answer it as to what I think it means.

I gather it means that a club could only sign so many players if they were free agents. If this is the case and a larger number of free agents became free agents than were allowed to be signed by the clubs, it would not be fair at all, obviously, to the free agents that were going to be left out and has no opportunity to sign with anybody.

If it means that only some clubs each year could sign players, I don't know how you would select those clubs or pick them out or what system you would use. I am not really clear on that proposal at all.

Q. Under this proposal, suppose one club in a given year had five or six players reach the number of years of service necessary for this proposed change to function. What would happen to that club? A. Obviously all these proposals—we have talked on the basis of the club that was going to bet players— [971] —obviously all these proposals

have the drawback of bleeding a club that loses the players. It could be in certain years that some club could have a greater preponderance of players that were eligible to become free agents and would lose all those players. It works both ways. You can strengthen a club or it is true the addition of one or two players, if they are great players, makes a tremendous difference, or you can take away from a club five or six players that would put them in a position of being a very weak club.

Q. Under this proposal— A. Either one of the two proposals.

Q. Under this proposal it would appear that is exactly what could happen to a club, is that correct? A. It could happen, yes.

Q. Mr. Miller also testified at Page 257 about "The possibility of a salary progression, year by year, a minimum salary progression that would have as its purpose making it too expensive for a club to pay that kind of a salary and option the recipient to the minors or keep him on the bench and thereby encouraging him to move to a club where his talents could be utilized."

What is your opinion on the effect of that proposal? [972] A. We have a minimum salary now in the first year. I would think that any salary minimums would be negotiated by collective bargaining. However, it is a difficult proposal to analyze. If the salaries were made—the salary position were made too low, obviously the player wouldn't move. If they were made too high, the players that would be the ones that were not signed would be the weaker players because obviously if it were too high the club would not want to pay the player this amount. He would be in the position probably of trying to sell his services every year and might not be successful. So it has those drawbacks.

Q. Mr. Miller also proposed, at Page 257 of the transcript, that "It is conceivable to have a maximum reservation list which is less than the active roster."

First let me ask you what you understand that proposal to mean? A. I understand it to mean that the active roster

in the major leagues, the active player list, is 25 players, and obviously a lesser number than that would be a number under 25.

Q. And he makes reference to a maximum reservation list. What is the reservation list at the present time? A. The maximum reservation list is 40 at the present time but that—

[973] Q. Excuse me. I didn't mean to interrupt you. A. But the active list is 25 players because those are the players playing. I gather that is what Mr. Miller meant.

Q. So his proposal is to have a reduction so that the maximum number of players would be something less than the present active roster of 25 players, is that the way you interpret it? A. Yes.

Q. So interpreted, what would be the effect of that proposal? A. It again would have the effect of putting the weaker players out because obviously the clubs would reserve their stronger players. It also would, I think, have the effect of being very harmful to the minor leagues because you wouldn't want to develop players that you couldn't keep and you probably, if you had a reservation list less than the active list, you wouldn't be able to reserve players that were future players that you had on option for the two or three years that are going to be major league players at a later date.

Q. You say it would adversely affect the farm system operations? A. Yes.

[974] Q. He has also suggested the possibility of competitive leagues. Do you recall his testifying to that effect? A. Yes.

Q. What, in your opinion, would be the result of the establishment of two separate leagues to compete for players? A. The history not only in baseball but in all sports is that is a disaster, that sooner or later one of the leagues has to give or they get together and live as one. When this competition starts, the weaker eventually would go under.

Q. Mr. Miller also suggested salary arbitration. What is your view of the feasibility of salary arbitration? A. This

is a very difficult situation for any arbitrator because you can't judge a player strictly by his batting average or his home run total. There are lots of things players do to help win games that are not reflected in averages, and to see and know what he does you must be there and observe it. I think the players and the people that are negotiating with them at the present time are in a much better position to negotiate and know exactly what they are negotiating about than an arbitrator. Also I think you would end up having an arm's length situation [975] between the players and management with arbitration. I think that you would probably find yourself in a situation where the player rated his services very much higher than he really thought he was going to get and maybe management rated the services lower than really felt because they knew arbitration was going to get in the picture.

I don't think it would be a good thing as far as relations between clubs and players are concerned at all.

Q. In your opinion, is a good rapport between the players and the clubs an important consideration? A. Absolutely. As we said earlier, the happer players and satisfied players are more likely to win pennants and win ball games.

Q. In your opinion, would salary arbitration tend to affect that good rapport between players and clubs? A. Yes, it could.

Q. Mr. Feeney, during the trial from time to time there have been references to the term "bench warmer", and I think Mr. Robinson referred to them as "The guys who sit on the bench," and they are apparently referring to players who are not regularly in the starting lineup of the team.

In your opinion, does the term "bench warmer," or "Guys who sit on the bench," convey a misleading impression of this group of players? [976] A. Yes, to the extent that it takes a full team to win, actually. You need substitute players. Today the substitute player more than likely

appears in the game on a day-to-day basis, although he may not be in the starting lineup. You need relief pitchers, you need defensive outfielders, you need extra catchers, pinch-hitters, you need players that can step in in case of an injury. We have had involved in baseball in recent years what they call a platoon system where certain hitters hit against left-handed pitchers and certain hitters hit against right-handed pitchers. All these players are part of a cog that makes the whole. There are some that eventually will be regulars on that ball club that are working their way up to that position, but at the time do a good job and are helpful as parttime players.

Really there is no such thing as a fellow who just sits on the bench and doesn't play. As a matter of fact, if you just look at the box score you can see nine men in a box score is an unusual thing today. It is usually 15 or 16 that get in a game each day.

[1035] Cross Examination By Mr. Topkis:

Q. During all the years of your negotiation with major league players, Mr. Feeney, did you ever negotiate [1036] a contract with the player's parent? A. You mean a —let me get this straight—a contract that was of a major league player who had already been signed?

Q. Right. A. No.

Q. Did you ever negotiate such a contract with an attorney representing such a player? A. No,

Q. Did you ever negotiate such a contract with an agent representing such a player? A. No.

Q. Did you ever permit anyone other than the player to engage in negotiations with yourself? A. I would have if he had requested it. No player ever requested it.

Q. Did you ever have a player make such a request? A. No.

Q. So that it is your testimony, then, that you have never negotiated with anyone other than the player, is that right? A. That is correct.

Q. Thank you. Now, there has been, in recent years, has there not, a very substantial incursion into organized [1037] baseball of players for whom English is only a second language? A. Yes.

Q. Have you ever called in to negotiations with a major league player, for whom English was his second language, a translator? A. No.

Q. Have you ever called in—and I take it you have never negotiated on behalf of such a player with an attorney, agent, a parent or anybody else? A. No.

Q. Now, some of the players with whom you have negotiated, Mr. Feeney, have been illiterate in English, have they not? A. None that I know of.

Q. All of the players with whom you negotiated, the major league players, are capable of reading and writing the English language? A. To the best of my knowledge they are.

Q. You have never tested them? A. I know that they can all write, and I assume that they can all read. I have never asked any of them.

Q. What is your— A. I would be very surprised if they couldn't.

[1038] Q. What is the basis of your belief, sir, that all of them are capable of writing the English language. A. Well, I have received letters from many of them, most of them, and they also have always signed their contracts.

Q. They have always signed their contracts with their names? A. With their names.

Q. Rather than with an X or something like that? A. Yes.

Q. And you have regarded that as demonstration that they could read and write the English language, is that right? A. It really never occurred to me that they could not. I am sure they all can when I negotiate with them.

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[1060] Q. Now tell me, Mr. Feeney, you spoke this morning of your negotiations with young players, players who had never before signed a baseball contract.

In such negotiations did you ever tell a young player that if he signed that first contract he would be bound for life to the Giants or whatever other club the Giants had signed his contract to? A. I don't remember ever telling him actually that, but I am sure he knew he was signed with baseball and what was entailed in it. He knew that he might be traded [1061] or he was signing with the Giants. That was the part of the bonus inducement that was made at the time.

Q. Did you ever explain to a young man about to sign such a contract that that contract was self-perpetuating until the end of his life unless he was voluntarily released by the club? A. No, I didn't explain that to him. I am sure they knew it.

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Francis L. Dale

[1235] Direct Examination By Mr. Hughes:

Q. Now, would you tell his Honor how it came about that you became involved in baseball in a business way, if I may put it that way? A. As part of my duties as president and publisher of the newspaper, we undertook a deliberate course of action to become a civic leader newspaper, to lead the city in its expansion economically as well as in its prestige. Beginning in 1965, approximately, the city undertook the task of building a new stadium, deeming it important to compete with major cities. Cincinnati was the original baseball, professional baseball team, and Cincinnati has a certain flavor and immense affection for its baseball team. The new stadium was deemed necessary, and they needed public support, and as publisher of the newspaper I was active in the plans for the stadium. In order to finance the stadium it was necessary to have a long term lease from the tenants of the stadium. The previous owner of the Cincinnati Reds, for various reasons, was unwilling to sign a long-term lease. There was at that time the possibility that the previous [1236] owner would move the Cincinnati

Reds to another city, and the city was trying to get him to sign the lease and he refused to do so, and at the urging of the city officials and the stadium committee I put together a group of local residents, businessmen, to attempt to buy the franchise from the previous owner on condition that he would sign a 40-year lease to finance the stadium.

We were successful in doing that. We purchased the Reds on January the 9th, 1967, immediately set about trying to get a football franchise, because we needed another tenant, not just one, and ultimately, essentially the same groups of men also purchased the football franchse; both the Reds and the Bengals signed 40-year leases.

[1239] Q. When you made the acquisition of the stock, the Cincinnati Reds, were you aware of baseballs' so-called reserve system? A. Yes, I was.

Q. Would you tell us just in a general way what your understanding of that system is? A. My understanding then was as it is now that the reserve system was a collection of various documents which contained the rights to reserve a ballplayer. Those documents include the Uniform Player's Contract, the Major League Agreement and the Professional Baseball Rules and the regulations that were issued thereunder and the various relationships between the major leagues and the minor league systems.

Q. Does this embrace the right of reservation? A. Yes, right of reservation, right of assignment.

Q. The rule against tampering? A. Right.

Q. When you acquired your interest, were you and your [1240] associates aware of the legal status of organized baseball under the Federal Antitrust Laws? A. Yes.

Q. At the time you made that acquisition, what was your understanding of the status of organized baseball?

Mr. Topkis: Objection.

Q. Legal status of organized baseball.

Mr. Topkis: Objection, your Honor. I see no relevance in this question.

Mr. Hughes: May I be heard, your Honor?

The Court: Certainly.

Mr. Hughes: Your Honor, in the Toolson case, the whole burden of the Toolson opinion was that baseball should enjoy this exempt status because of the large amounts of investments that had been made in baseball by reason of the exemption that had been granted way back in the Federal league days, and I think it is relevant to show that down through the years since Toolson in making investments in baseball clubs, that owners have had in mind that special status and have relied upon it and that is what I propose to bring out.

The Court: Objection overruled.

Mr. Hughes: Now may we have the question again?

The Court: Would you please, Mr. Court Reporter.

[1241] (Question read.)

A. It was my understanding at that time that baseball had been considered by the Supreme Court to be outside the scope of the antitrust laws.

Q. Were you at the time familiar with the so-called Toolson case? A. Yes, sir, I was.

Q. You have read that case? A. Yes, sir.

Q. And were you familiar with the cases decided by the Supreme Court subsequent to it, the Radovich case and the case involving boxing? A. In a general way I was. I did not pursue the cases following this, but in the course of my examination of the situation at the time we acquired the stock, I was naturally concerned about contingent liabilities that we might be getting into, and I was aware of the fact generally that there had been hearings before Congress. that legislation had been proposed but had not passed. I was aware in a general way of the—I believe it is the Federal Baseball League case that had been decided years ago, and that the Supreme Court had refused to include baseball. I was aware that in essence the question of whether baseball had been included in the anitrust laws had been left to [1242] Congress.

Q. At the time you made the investment did you and your associates discuss the legal aspects of baseball prior to making the investment? A. Yes, we did. This came about because we were required, of course, to examine the possibility of contingent liabilities and the closing documents required covenants and all that sort of thing. So that was among the checklist of items that we considered before closing.

Q. You told us your understanding of baseball's status. Did you and your associates rely on that understanding in making the investment in the club? A. Yes, we did.

Q. From your standpoint, was there anything about Cincinnati that made that a particularly important factor in your thinking at the time? A. It was perhaps—well, yes, there was something that was particularly important in that. This factor took on a greater significance to us than it might have someone else.

Q. Would you tell us what it is, please? A. As I have indicated already, there was a possibility that the Cincinnati Reds' franchise would be moved from Cincinnati, which would have been a great loss to our [1243] pride, a great hurt to our pride. In addition to that, we had a number of Cincinnati ballplayers on the team playing before their home crowd. There was great public acceptance of them and great—they have great notoriety and they are very valuable to the Cincinnati franchise. In considering whether we should buy the franchise or not, we would want to know, of course, and we investigated whether or not those players would remain with the club, and the reserve system assured that to us and we relied on that.

There is a tremendous affection for this ball club in Cincinnati. It is one of the smallest if not the smallest market in the major leagues. We have one of the smallest parks, yet we have always enjoyed a relatively high level of support from the fans and we are convinced that this is because of this rapport between the hometown boys coming from high school, through the American Legion teams,

through the minor leagues and then coming home to play in front of the hometown crowd.

So this was one of the major assets we were acquiring.

Q. Mr. Dale, would you and your associates have made this investment if you did not understand or believe that baseball had the exemption from the antitrust laws as [1244] you have described it? A. I don't think we would have, no, sir.

Q. Did you consider the possibility that Congress might remove the exemption? Did you take that into account? A. Yes, we did, but in that instance we—what we were trying to protect ourselves against was a retroactive contingent liability, and in the Congress we did not believe that they would be passing any retroactive legislation that would place a liability for antitrust violation on us in any sense.

Q. Did you take into account the likelihood that if Congress were to explore the field of legislation that interested parties would be given an opportunity to be heard and state their case? A. Yes, I did, and if we were part of that baseball, I expected I would be down there trying to explain it to Congress.

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[1248] Q. And will you briefly tell his Honor the reasons why you disagree? A. Mr. Nathan is talking about a baseball of the past and not the baseball as it is today. In the first place, the business investment, the return on the investment, is not the prime reason for the investment. There are many more investments that are much better than getting into baseball, I assure you, so that the incentive of the money is not the prime incentive. The prime incentive of the owners of baseball, whether they are in it as a business or as a community service, which is closer to our situation, is to try to win for the city and for themselves the prestige that it brings, the upsurge of the [1249] economy that it brings to the city, and there is the pride that is there.

That is the prime motivating factor in ownership.

Secondly, you no longer are trading players for cash. The selling of players is a thing of the past. You are now trading ballplayers and your are trading skills. The commodity in the market today is skill, not money.

And so I do not agree with Mr. Nathan that the owners would be motivated by the desire to get some cash. That is not today's baseball.

[1258] Cross Examination by Mr. Topkis:

Q. Mr. Witness, did you pay more or less for the Bengals than you paid for the Reds? A. Approximately the same amount.

The Court: Thank you, Mr. Topkis, for your fairness.

Mr. Topkis: Not at all, your Honor.

Q. You paid about the same amount. All right. Now, of course, in football there is not the reserve system which characterizes baseball to its fullest extent, is there? A. Not exactly the same. There is a reserve system, however.

Q. Oh, yes, but in football a player at the end of his last year of his contract—and if it is only a one-year contract, at the end of that year—may decide to play out his option by which we mean play the next year for a stipulated figure; isn't that right? A. Yes, sir.

Q. In your judgment, does that render the operation of professional football economically or otherwise impossible? A. No, sir.

Q. You bought into football on that basis, didn't you? A. Yes, sir.

Q. Does the existence of the football right in a player to play out his option make you regard your investment in [1259] football as speculative or risky or anything like that? A. Well, it is not one of the finest investments that you can make, in my belief. Any investment in professional sports is not the finest investment you can find from a business point of view.

Q. Agreed, but from some point of view you decided to

invest in the Bengals and so did the other members of your syndicate. A. Yes.

Q. As you had decided to invest in the Reds? A. And the primary reason for that investment, primary reason was—

Q. I don't think I asked for the primary reason. A. Sorry. I apologize.

The Court: All right.

Q. Did you ever play baseball, Mr. Dale? A. Only as a high school sandlot player, not organized baseball, no, sir.

Q. Now, you testified that you made a legal inquiry before you bought the Reds. A. Yes, sir.

Q. And you made the same kind of legal inquiry when you bought into the Bengals, I suppose, or bought the Bengals? A. Yes, sir.

[1260] Q. And you found that the Bengals were not exempt from the antitrust laws, didn't you? A. Yes, sir.

Q. That didn't deter you from making the investment? A. No, sir.

Q. And in your study of baseball status under the laws, you found, I suppose, that baseball is not exempt from the operation of the 13th Amendment? A. Yes, sir.

Q. And you considered that? A. Not specifically, no.

Q. Did you consider whether baseball is exempt from the operation of the antipeonage statutes? A. I am not aware of any antipeonage statutes that apply here.

Q. Very well. Did you consider whether baseball was subject to the operation of the antitrust laws of the State of Ohio? A. Yes, sir, we did.

Q. And what conclusion did you reach? A. We concluded that it would not violate the antitrust laws of the State of Ohio.

Q. It would not violate the antitrust laws of the State of Ohio? [1261] A. That's right.

Q. But it was subject to them, is that right? A. Well, no case had been held about this. It had not been raised in the State of Ohio, so we did not know.

Q. You didn't have any idea that it was exempt from the operation of the laws of the State of Ohio, did you? A. The issue had never been raised.

Q. I am asking you whether you had a professional opinion on that subject. A. My opinion would be—was then and is now—that if it were raised that the reserve system would be held to be reasonable in light of the circumstances and it would therefore be held not violative of the antitrust laws.

Q. Very well. And in order for a Court to determine that question it would first have to determine the question of whether baseball was subject to the antitrust laws of the State of Ohio, isn't that right? A. That's true, yes.

Q. And so you reached the conclusion that it was subject to the antitrust laws, but being a reasonable restraint it did not violate the Ohio laws, is that right? A. No, sir. I reached the conclusion that if it were held subject to the antitrust laws of Ohio, it would then be held not violative of such laws. I did not make the decision [1262] whether it was subject or not.

Q. You just did not form any judgment on that subject? A. I assumed—I went to the assumption that if it were held to be under the antitrust laws of the State of Ohio it would also be held that the reserve system did not violate it.

Q. Did you consider whether it would violate the antitrust laws of the State of New York? A. No, sir, I did not.

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[1286] A. I did not study the legality of the reserve system except with respect to Ohio. What I discovered in my investigation was that baseball is exempt by reason of the Toolson case, and that if anything were to be done about the reserve system that it would probably be done by Congress and not by courts, and that was the conclusion I reached. I did not try to be the judge in all the future cases.

Q. That was a conclusion that you reached under Federal law, is that right? A. And on that basis, among other bases, we made our investment, yes, sir.

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[1289] Q. For tax purposes, Mr. Dale, how do you depreciate player development costs?

Mr. Hughes: I object to that as incompetent, irrelevant and immaterial. It is certainly not within the scope of the direct. We didn't go into this subject on direct.

The Court: I will take it, Mr. Hughes, in general terms. No specific figures.

Can you answer that question, Mr. Dale? A. They are expense.

Q. Immediately on being incurred? A. Yes, sir.

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[1295] Q. You testified, didn't you, that getting a roster of players who were known to and held in warm regard by the Cincinnati fans was one of the indispensable conditions of your making your investment? A. Yes.

Q. But you, shortly after making your investment or three years since making your investment, have traded away about 80 per cent of those players? A. Not all players are known to and warmly held in high regard by all fans. Indeed, many of them are held in disregard.

Q. Is Jim Maloney held in extraordinarily high regard by the Cincinnati fans? A. Yes. He is a very fine pitcher.

Q. And Tommy Helms? [1296] A. Yes. He has been an All Star second baseman and is held in high regard.

Q. Tony Perez? A. In very high regard.

Q. What is his position? A. He plays third base and is now leading the league in home runs and runs batted in, and has been an exceptionally fine ballplayer.

Q. And Pete Rose? A. Two-time major league batting champion, Cincinnati boy, held in high regard.

Q. Cardenas, the shortstop on that club, he was held in pretty high regard, too, wasn't he? A. Yes, he is.

Q. And Vada Pinson, the center fielder, was held in extraordinarily high regard, wouldn't you agree? A. He was held in high regard. Not the greatest center fielder in the major leagues at all. We received for him another player that was also held—is now held in high regard equally with him.

Q. And Johnny Edwards? A. Johnny Edwards was held in high regard, but not a superstar as we have in place of him now.

[1297] Q. As you have what? A. As we have in place of him now. I am trying to imply to you, sir, that trades are made—you don't refuse to trade a ballplayer solely because he is held in high regard. Sometimes you have to give up a ballplayer who is held in high regard to get another one who will be held in even higher regard.

Q. So what you do is trade for hopes and expectations, is that right? A. Yes. Skill is the commodity that you are dealing with in baseball.

Q. Skill is the commodity? A. Yes.

Q. Not affection for the player? You expect the affection will follow the skill, is that right? A. Yes, that's right.

Q. What was the last time Cincinnati won a pennant? A. 1961.

Q. And how many of the starters on that club are today playing for other clubs? A. I have no idea.

Q. That is a club that was held in extraordinarily high regard by the people of Cincinnati, wasn't it? A. Yes, sir.

[1298] Q. A pennant winner and World Series participant? A. Yes.

Q. Did Cincinnati win or lose the World Series? A. Yes.

Q. But nevertheless the town loved the club? A. Yes.

Q. Frank Robinson was on that club, wasn't he? A. Yes.

Q. He was and is one of the superstars of baseball, isn't that right? A. Yes.

Q. He was traded away? A. Not by me, by the previous owner.

Q. By Mr. DeWitt? A. Yes.

Q. Vada Pinson was on that club? A. Yes.

Q. As a starter? A. Yes.

Q. He was traded away by you? A. Yes.

Q. And Lou Cardenas was the shortstop on that club? A. I am not clear whether he was a starter or not, [1299] but I take your word for it if the record shows it.

Q. I believe that the record does so indicate that he was starter at least in the series games. A. I would be glad to take that.

Q. He was traded away by you? A. Yes.

Q. And Johnny Edwards was? A. Yes.

Q. The first baseman on that club was—no, I beg your pardon.

Well—never mind.

A. Gordy Coleman, I believe.

Q. He is retired? A. Yes, sir. Now with the club.

Mr. Kramer: What was the last part of the witness's answer?

The Witness: He is now working with the club.

Q. In an executive capacity? A. He is head of our Speakers Bureau.

Q. He is head of your Speakers Bureau? A. Yes.

Q. You said you spent about $990,000 on player development in 1969, is that right? [13[illegible] A. Yes, sir.

Q. How much did you receive for the sale of players for the 1969 expansion? A. The total expansion payment to the previous clubs was $2 million each. We have not received it all yet.

Q. Was part of that allocated to the sale of players? A. Yes.

Q. It is suggested to me that 700,000 was. Is that right? A. I am sorry, that doesn't sound right to me, but I don't have the figure.

Q. How many players did you sell to the expansion team? A. I am sorry, I don't know.

Q. The figure is suggested to me of four. A. I would think that would be—four to six would be my guess. I believe that is correct.

Q. Do you know who they were? A. No, sir, I do not know.

Q. They surely were not among your stars? A. No, sir.

Q. They were ordinary run-of-the-mine ballplayers, not meaning to downgrade them personally? A. They were not our stars.

[1301] Q. Didn't you testify that it takes a long time to obtain public acceptance of a player? A. I think it does generally, an established ballplayer, yes, sir.

Q. Now the fans in Cincinnati are rather warm in their regard of Bernie Carbo, aren't they? A. Yes, they are.

Q. And Dave Concepcion? A. Yes.

Q. How long have those players been in Cincinnati? A. This is their rookie year.

Q. They have been there nine weeks, haven't they? A. Yes, sir.

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[1305] Recross Examination by Mr. Topkis:

Q. Mr. Dale, these rules that you just testified with regard to in response to Mr. Hughes' questioning, those are the rules that operate in professional football, aren't they? A. Yes, they are.

Q. You invested as much money in professional football as you did in professional baseball? A. Yes.

Q. In professional football, has anyone—has any player on the Bengals yet played out his option? A. I don't believe so, no, sir.

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John J. McHale

[1310] Direct Examination by Mr. Hughes:

Q. So that you were one of the group of six who became partners in this venture? A. Yes, I became a 10 per cent partner in the investment.

Q. And for the investment that you say you made, what is it that you acquired with that particular investment? A.

Well, we acquired the right to play baseball in the National League and to acquire under—

Q. They call that the franchise, don't they? A. Franchise, and to acquire the players that the league formulated as a plan to stock these clubs.

Q. So that the two assets, if I may call them that, were the franchise rights and the rights of the player contracts, is that correct? A. That's right.

Q. And it was for those rights that you paid the sum of $10 million, is that correct? A. Yes.

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[1313] Q. When you acquired your interest in the Montreal club, were you aware of the legal status of organized baseball under the Federal antitrust laws? A. Yes, I had been in the game and in the offices of baseball during the Toolson case and was quite aware of where we stood.

Q. What was your understanding of baseball's status? A. Well, the understanding I had was that the Supreme Court had upheld baseball's position insofar as the reserve clause was concerned and said that if there was going to be any change it should come from the Congress.

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[1329] Cross Examination by Mr. Topkis:

Q. Do I understand, then, just to sum it up, if I may, Mr. McHale, that for personal investment of $100,000 and an additional contingent liability of $25,000 you got 10 per cent of a business with an opening net worth of ten million? A. Yes.

[1330] Q. And do you testify to this Court that were it not for the reserve system in precisely its current form and no other, you would not have made this investment? A. I would not.

The Court: In other words, you so testify?

The Witness: Yes.

The Court: In other words, you adopt what the questioner put in his question? Do you want to have it read again to you?

The Witness: Yes.

The court: Read it again.

(Question read.)

A. Yes.

Q. In fact, do you believe, Mr. McHale, that no investment in baseball would be appropriate were it not for the reserve clause in precisely its present form? Isn't that right? A. No, I said that I wouldn't have made my investment. That happens to be as far as I could go in this investment.

Q. Speaking of the average investor, Mr. McHale, you would think it inappropriate for an investor to invest in baseball were the reserve clause modified in the slightest degree, wouldn't you? A. I would not recommend an investment in baseball. . . .

[1331] Q. You wouldn't recommend such an investment if the reserve clause were modified either by this Court or by the Congress? A. Well, Mr. Attorney, the reserve clause has continually been modified in baseball as we have gone through the evolution of the game since I have been in it.

Q. Yes. A. So you would have to identify the modification for me before I would answer that question in such a general way.

Q. Suppose this Court were to hold that the reserve system as it exists today violated the American antitrust laws. You would not urge anybody or recommend that anybody invest in baseball, is that right? A. If it meant the abolition of the reserve clause as we know it, I would not recommend that anyone invest in baseball.

Q. How about modification of the reserve clause? A. Well, what modification are you speaking of?

. . . . . .

[1346] Q. My question, Mr. McHale, was whether you had ever heard of anybody losing money by investing it in a major league baseball club. A. My answer is no.

Q. Thank you, sir.

Yet you consider baseball a highly speculative investment. Would you tell me, please, what you regard as a safe investment? A. Government bonds.

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Robert A. Reynolds

[1358] Direct Examination by Mr. Hadden:

Q. When you acquired your interest in the California Angels, were you aware in a general way of the legal status of organized baseball under the Federal antitrust laws? A. Yes, generally.

Q. What was your understanding of that status? A. It was my understanding that the Supreme Court of the United States had exempted baseball under the antitrust laws and that unless Congress should enact legislation to the contrary, that the exemption would remain.

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[1360] The Court: Did you consider—at that time did you consider the possibility that Congress might remove the exemption?

The Witness: May I answer—

The Court: This is rather ticklish ground. If you can possibly answer yes or no, I wish you would. A. Yes.

Q. What were your expectations in that connection? A. Our assumption was that if Congress would at any time deem it a matter to go into or go back into, that baseball would have opportunity to present its position, and we relied further on the fact that the House, in 1958, did pass a bill that was not enacted, reserving to baseball this exemption.

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[1369] Q. Have you had any relationships with professional football subsequent to your activities as a football player? A. Yes.

Q. Would you describe your activities in that connection? A. In 1963 a group of us—I was one of the group—[1370] acquired the minority interest, 49 per cent interest in the Los Angeles Rams. I became at that time an officer of the Rams, vice-president, member of the executive committee and a Board member. I still hold the latter three positions, even though about three years ago I sold my interest in the Rams.

Q. In connection with your memberships on the Board of Directors and the executive committee of the Los Angeles Rams, did you have occasion in the regular course of business to attend such meetings as were held of those two Boards? A. Yes.

Q. And as a result of your participation in the affairs of the Rams are you generally familiar with the affairs of the Rams and the National Football League? A. Generally so.

Q. I think I omitted to ask you a moment ago, Mr. Reynolds, to what extent percentagewise do you now participate in the ownership of the California Angels? A. 18 per cent.

Q. You have described what the football reserve system was as you knew it when you were a player. Is it the fact that certain changes have taken place in the football reserve system since that time? A. Yes.

Q. Approximately when was the first such change made, [1371a] A. In the early '60's, I believe it was, this compensation rule came into being.

Q. So that as originally adopted, the compensation feature did not attach to the rule, was not part of it? A. Yes.

[1372] Q. Now, if you know, Mr. Reynolds, during the approximately 10-year period following the adoption of the rule in its initial form in the late 1940's, did any players in the National Football League play out their option? A. None that I know of.

Mr. Hadden: May I have a moment, your Honor, please?

The Court: Certainly. Take your time.

(Pause.)

Q. In the years following the decade after the adoption of the first football option rule, did any players, to your knowledge, play out their option?

Mr. Topkis: Objection. That question has just been asked and answered.

The Court: I thought so.

Mr. Hadden: I asked him about the decade following. That would bring it up to the late fifties, your Honor. Now I am asking if subsequent to that period did any players play out their option.

The Court: I will let him answer it. A. Yes.

Q. And who was that player or players, if you can tell the Court. A. R. C. Owens of the San Francisco 49ers played out [1373] his option, and was purchased or acquired by Baltimore. A more recent one that I can recall is Dave Parks, likewise of the San Francisco 49ers, who was acquired by the New Orleans Saints.

Q. Now, referring to the first of those instances, Mr. Reynolds, the R. C. Owens option playout, was that during the period prior to the adoption of the compensation feature of the NFL Rule? A. Yes, I believe it was prior to that.

Q. And was Mr. Owens' playing out of his option the only instance of which you are aware on which a player did play out his option prior to the amendment to the rule? A. It is the only one I can recall.

* * * * * * * * * * *

[1394] Cross Examination by Mr. Topkis:

Q. You testified yesterday, Mr. Reynolds, that in 1948 or 1949 the National Football League adopted a rule whereby a player could, as they put it, play out his option, and in '61 or '62 a rule change was made to provide that the club los-

ing a player's services had to be compensated for its loss either by an agreement between the clubs [1395] involved or, in the final analysis, by ruling of the Commissioner. A. That was my general recollection.

Q. Right. Now, prior to 1948 or thereabouts, the National Football League didn't have any such rule, did it? A. Correct.

Q. It had a total reserve system akin to baseball? A. Correct.

Q. In the thirties and forties, the National Football League was a relatively prosperous venture? A. National Football League?

Q. Yes. A. They were beginning to prosper in the late thirties.

Q. But you would agree with me, I take it, that in the 1950's the National Football League became a much more prosperous venture? A. Yes.

Q. And in the 1960's it became even more prosperous? A. Yes.

[1396] Q. Now, you testified yesterday that it was your understanding that baseball was exempted under the Federal antitrust laws when you acquired your interest in the Angels, is that right? A. Yes.

Q. You didn't inquire into the subject before making your investment of whether baseball was covered by the 13th Amendment? A. What?

Mr. Topkis: May I have my question read, your Honor?

The Court: Certainly. Would you, please, Mr. Court Reporter.

(Question read.)

A. I don't recall that.

Q. Nor did you inquire into the subject of whether the antipeonage laws were applicable to baseball? A. No.

Q. Nor did you inquire into whether the various laws of the states applying to restraints on trade applied to baseball? A. I don't recall that we did.

Q. So what you relied on was baseball's alleged exemption from the Federal antitrust laws, is that correct? A. In the main, yes.

[1397] Q. You testified yesterday that you placed some reliance on the fact that the House of Representatives passed a bill in 1958 according baseball an exemption under the Federal antitrust laws, is that right? A. That was my recollection, yes.

Q. Did you rely also on the fact that the Senate refused to pass that bill? A. I don't recall that we did.

Q. When you borrowed money in 1960 or when money was borrowed in 1960 partially to finance the initiation of the California Angels' franchise, was there any loan agreement signed? A. I don't recall that there was.

Q. Did I understand you to say yesterday that if baseball adopted the football rule as to the reserve system, whereby a player is free to play out his option on condition that the club losing his services, if he go to another club, must be compensated, did I understand you to say that if a player under those circumstances left the Angeles you would not expect to be adequately compensated? A. I don't recall that.

Q. Well, it is entirely likely, isn't it, that if that system were to come into operation and you had the assurance that either by agreement with the club acquiring one of your [1398] former players or by ruling of the Commissioner you would be compensated, it is entirely possible and likely that you would be fairly compensated, isn't that right? A. Oh, I think that would depend upon the circumstances.

Q. Well, if the circumstances were that you had the right either to be compensated by an agreement that you entered into voluntarily and had the further right to have the Commissioner set fair compensation if you did not agree with the acquiring club, wouldn't those be circumstances under which you could be relatively sure of getting fair compensation? A. With the players involved, it is a matter of

quality matching quality. I don't know whether it would be fair or not.

Q. You don't trust the judgment of the Commissioner of Baseball? A. It is not a question of whether or not I trust the judgment of the Commissioner or anyone else when it comes to the compensation, of losing one ballplayer for another. The judgment of what that quality might be on an exchange might best rest in the field manager who is going to have to play the ballplayers.

Q. Isn't this the fact, Mr. Reynolds, that you like the system the way it is right now? A. I certainly do. It has lasted a long time.

[1399] Q. And you would hate to see it changed? A. Indeed I would.

Q. And change would make you uncomfortable and uneasy? A. Not to the degree of finality that you speak. Everything changes.

Q. Then you could live with a change of the kind we have been talking about?

Mr. Hadden: Your Honor, I think it should be specified what kind of change particularly. That is a very difficult question for the witness to answer.

The Court: Yes.

Mr. Topkis: Oh, I think I have been quite explicit, your Honor.

The Court: Well—

Mr. Topkis: I will try again. I do not want to make Mr. Hadden uncomfortable.

The Court: No, he is not uncomfortable. He doesn't look it, anyway.

Mr. Topkis: I am glad to see that.

Q. Mr. Reynolds, if baseball were to adopt the present football rule, would that make you uncomfortable or uneasy or could you live with it? A. It would depend very much on what might be in prospect in the way of the change. It would depend very, very [1400] much, to my view—

Q. I am telling you the kind of change I am asking you to consider, namely, the adoption of football's rule. That is the change. A. I would be uncomfortable.

Q. And your reason for being uncomfortable is that you would not be sure that you would get the right kind of compensation if you happened to lose a player who played out his option, is that right? A. That is not the entire reason.

Q. What is the other reason? A. The shortness of contract, the posture I think that it would place baseball in. I think the structure of baseball as we know it could be jeopardized under that rule.

Q. You say shortness of contract. By that you mean that you might lose your development costs, is that right? A. Whether or not we would lose the development cost is, I think, only one aspect of the situation.

Q. Well, let us take that one aspect for a moment. In football the rule is that when a player plays out his option and goes to another club, the club losing his services must be compensated by receiving a player of equal value; isn't that right? A. That is my understanding, yes.

[1401] Q. So that you would not lose your development costs because you would get a player of equal value, isn't that right? A. I don't know whether you would get a player of equal value or not.

Q. That is what the rule says, though, doesn't it? A. Fair compensation—

Mr. Kramer: I object to that. Just a moment, please.

I think if we are going to talk about the rule, your Honor, even in cross examination, with this degree of specificity, the witness should be handed the rule and we should all be sure he knows what the rule is.

Now, it so happens, if your Honor please—and what I say is not testimony—that that is not the rule of football. I will be happy to hand it to Mr. Topkis.

Mr. Topkis: Your Honor, I welcome any help from Mr. Kramer, of course, but when a witness gets on the witness

stand and says that grass will grow in the streets if baseball adopts football's rule, then he knows what he is talking about when he makes the statement, or else he doesn't know anything.

The Court: Well, let's test it out.

Do you know what rule Mr. Topkis was referring to [1402] in his question, Mr. Reynolds?

The Witness: I know it generally as the rule of compensation of a club whose player plays out his option and then becomes a free agent.

The Court: Would you be good enough, Mr. Topkis, to read it for my own benefit? I want to be sure that I follow it meticulously.

Mr. Topkis: Gladly, your Honor, and I think both Mr. Reynolds and I have been proceeding on an accurate understanding of it, but I will be glad to read the full text of it into the record at this point. This is from the Constitution and Bylaws for Major Professional Football Operations. It has been marked as Plaintiff's Exhibit 12, and I read Subdivision H of Article XII.

"Any player whose contract with a club has expired shall thereupon become a free agent and shall no longer be considered a member of the team of that club following the expiration date of such contract. Whenever a player becoming a free agent in such manner thereafter signs a contract with a different club in either the NFL or the AFL then, unless mutually satisfactory arrangements have beeen concluded between the two clubs, the Commissioner may name and then award to the former club one or more players from the active reserve or selection list (including future selection choices) of the [1403] acquiring club as the Commissioner in his sole discretion deems fair and equitable. Any such decision by the Commissioner shall be final and conclusive."

The Court: Thank you.

Mr. Topkis: End of quote.

The Court: Thank you.

Q. Now, under that rule the club losing a player's services is guaranteed that it will get fair compensation, isn't it? A. Under that rule, yes.

Q. And were that rule to operate in baseball, then a club losing a player's services, were baseball to adopt the football rule, would be assured of getting fair compensation, isn't that right? A. I am not certain that it would.

Q. Well, nobody is certain of anything in this fallible world, but to the degree that we can be certain? A. To my view, the matter of compensation in baseball would be a difficult procedure.

Q. More difficult than in football? A. Yes.

Q. For what reason? A. In football you have the matter of draft choices, of players out of college of high reputation, and these draft [1404] choices might be a matter figuring in compensation. You don't have this in baseball. You don't have it because of the way baseball is structured.

Q. You have draft choices in baseball, don't you, in the free agent draft? A. Yes.

Q. And in the minor league draft? A. Yes, but they are not of the quality of the draft choices that are present in professional football.

Q. But that could be taken into consideration in assessing fair value, couldn't it, Mr. Reynolds? A. I am not sure.

Q. No, we are not sure of anything. We can agree on that. But to the degree that human beings can operate on a basis of fair predictability, that is a reasonable conclusion, isn't it? A. I can't think that it would be reasonable because I just don't believe that it could be worked in baseball like it perhaps is in football.

[1405] Q. You would worry about it in baseball? A. Indeed.

Q. Do you worry about it in football? A. It has seemed to work in football.

Q. Thank you. But you are worried that it wouldn't work in baseball? A. I'd be concerned about that.

Q. Have you ever heard—you studied economics in col-

lege, you said, you had a minor in economics? A. Major in economics.

Q. Major in economics. Good. Have you ever heard the quotation from the English economist, John Hicks, to the effect, and I roughly quote, "The best return for the monopolist is the enjoyment of a quiet life"? A. Yes, I have heard that.

Q. That is what you are after in the baseball system, isn't it, that happy quiet life? A. It is anything but that.

Q. But you would regard the adoption of football's rule as a disturbance of whatever level of tranquality now exists? A. I regard the reserve system under which baseball has lived for many, many, many years as being a good system. It has brought baseball in this country to the degree of [1406] excellence that it now holds.

Q. Do you think that football has as high a degree of excellence as baseball? A. It has a very high degree of excellence, indeed.

Q. Would you now please answer my question, sir? A. Would you repeat the question?

The Court: Would you be good enough, Mr. Court Reporter.

(Question read.)

A. Yes.

Q. You testified yesterday, I believe, that the Angels would not be interested in bidding for the services of a player who had played out his option even if compensation could be awarded to the club for which he formerly had played is that right? A. That is correct.

Q. Were the Rams during the years that you were associated with them—and you are still associated with them—have the Rams been interested in bidding for the services of players who have played out their options? A. I don't recall so.

Q. Have the Rams adopted a deliberate policy of never bidding for such services? A. Not that I know anything about.

[1407] Q. So that you as an individual might have some hesitancy but the club has no policy against such bidding, is that right? A. That is my belief.

Mr. Topkis: A moment, please, if I may.

The Court: Surely.

(Pause.)

Q. Tell me something, Mr. Reynolds, who would you rank as the best fullback playing in professional football today? A. Nance, perhaps.

Q. Jim Nance of the Boston Patriots? A. I would think he would be very good.

Q. Were he to become a free agent, would you be interested in acquiring his services for your club? A. I don't know if we would or not.

Q. You wouldn't want to have the best fullback in professional football on your club? A. I think that depends upon the way such a player might fit in.

Q. Do you usually have trouble making room for the best? A. No.

Q. Would you agree with me that Joe Kapp of the [1408] Minnesota Vikings is a pretty good quarterback? A. Yes.

Q. He is an excellent quarterback, isn't he? A. Yes.

Q. Would you be interested in having him on your club? A. Not with Roman Gabriel.

Q. I will agree with you that you are holding pretty well right now. Would you agree with me that Don Maynard of the Jets is a pretty good end? A. Yes.

Q. One of the best in the league, isn't he? A. He has that reputation.

Q. And do you know the work of Marv Fleming of the Packers? A. I know of it.

Q. He is a splendid tight end, isn't he? A. Yes, he is so regarded.

Q. Would you be interested in bidding for the services of any of the men we have just been talking about? A. I would.

Q. I have a newspaper clipping in my hand, and I will have it marked.

(Plaintiff's Exhibit 31 marked for identification.)

[1409] Q. I have a newspaper clipping in my hand from the Washington Post of May 1, 1970, which indicates that Joe Kapp, Don Maynard, Jim Nance and Marv Fleming, as of May 1, were all expected to become free agents that day.

Mr. Hadden: If your Honor please, I think this is an improper cross-examination. I object to the question. It is from a newspaper clipping. I ask the question be stricken.

The Court: I really am somewhat apprehensive myself, but I do think we ought to give Mr. Topkis a chance to finish his question and then I can rule.

What were you going to ask?

Mr. Topkis: May I have what I started read back, your Honor?

The Court: Surely. Mr. Court Reporter, please do so.

(Record read.)

Q. Did your club go out and bid for their services? A. I don't know.

The Court: Wait a moment. Do you still press it?

Mr. Hadden: It hasn't been shown whether the witness is aware or unaware of the alleged facts which appear in the newspaper article.

The Court: Yes. Sustained.

[1410] Mr. Topkis: Your Honor, I am interested only in the fact of whether he went out and bid.

The Court: Then ask him if he knows of his own knowledge.

Mr. Topkis: Very well.

Q. Do you know whether your club went out and bid for the services of those players? A. I don't know.

The Court: Next question.

Q. If it were possible for the club losing a player's serv-

ices when he had played out his option to be fairly compensated, that would end your concern about baseball's adopting a football rule, isn't that right? A. I don't think it would end there.

Q. Where would your concern next manifest itself? A. It would go back to the concept or the basis or base from which such an arrangement would spring or be placed in motion.

Q. Could you get a little more particular for me, Mr. Reynolds? What precisely would concern you? A. The contract, basic contract, would be—depending upon how you would set up contracts and from that point go on in compensation would be a deciding factor, to my view.

Q. I am not sure I understand you. What exactly [1411] would you be concerned about? A. As I understand it, the thing that would put compensation would not necessarily be of itself—it would be accompanied—if it were accompanied by another aspect, I think you'd have more than just compensation involved.

Q. What more? A. Well, in the matter of football, if you had the player playing out an option, a year contract and playing out an option, that to my view would be onerous in the baseball structure.

Q. You mean some prejudice would be created by the mere fact that a player was playing out his option? A. Well, it certainly would be a precedent in light of what we now have.

Q. You mean it would be different from what you now have? A. Yes.

Q. But it works out all right in football you testified a little while ago? A. It seems to have.

Q. Then why wouldn't it work out in baseball? A. Because baseball is structured differently. It is because of your minor leagues and the way baseball has to bring baseball players up to the major leagues. It is [1412] basic in the game.

Q. What has that got to do with the impact on baseball of allowing a player to play out his option? A. I think it

has a very great deal to do because of the investment that the major leagues have in the players, the time that is required to bring players through the farm systems into the major league roster.

Q. Well, we have agreed that we are proceeding on the assumption that fair compensation would be paid if a club lost a player's services through his playing out his option and signing with another club. A. To my view, compensation would be very difficult to administer in baseball.

Q. I know you say that and I am asking you to make with me the assumption that fair compensation would be paid and I am asking you on that assumption would there be any disadvantageous impact on baseball of baseball's adopting the football rule? A. I don't know.

Q. Thank you very much.

Mr. Hughes: If your Honor please, may I see this exhibit, please?

Mr. Topkis: Surely.

The Court: Referring to?

[1413] Mr. Hughes: Exhibit 31 for identification, which was marked during the examination of the witness. I offer it in evidence.

Mr. Topkis: I object, among other reasons because I am in the middle of my cross-examination.

The Court: That latter reason is sufficient to sustain the objection. You may renew your offer, Mr. Hughes.

Q. Mr. Reynolds, how many players did the Rams draft in 1969, that is—excuse me. Let me make my question very clear, sir. I apologize for not having done so.

In the player draft preceding the 1969 season, how many players did the Rams draft? A. I don't know that number.

Q. Doesn't each team draft 20 or 25 players? A. Most of the time, but not always. It depends upon the quality in some instances and how far they go down.

Q. You mean go as far as you want to and then you stop? A. Yes.

Q. You draft as many players as you want to and then you stop, is that right? A. That is my understanding.

Q. Now, of the players that you drafted prior to the [1414] 1969 season, how many of them made the club and stayed with it? A. By the club, you mean the 40 man—

Q. Active roster for the playing season, yes. A. I'd be guessing.

Q. All right, I will pass to another subject.

You suggested yesterday, I believe, that the Angels are today in second place and last year finished third by reason in part, at least of the help they received from players drafted in the free agent draft? A. Yes.

Q. Now, other clubs, too, benefited from the free agent draft, didn't they? A. Yes.

Q. And they could have done better or worse than you? A. I suppose so.

Q. Now, you testified yesterday, I think, about the clubs needing the rrserve system in order to assure themsleves a flow of players from the minor leagues, the training grounds for the major leagues, is that right? A. Yes.

Q. And it was your testimony, as I understand it, that the clubs needed to be able to get the lifetime call on players' services that the reserve system gives them [1415] so that they would be encouraged to invest in the minor leagues, is that right? A. This is my view.

Q. Yes. Well, now couldn't that same problem be handled, that is to say, the problem of supporting the minor leagues, by having major league baseball jointly subsidize the minor leagues without the reserve system? A. I wouldn't hold to that.

Q. You just don't know how that would operate, is that right? A. In my view, it would be a very difficult thing to administer, I think clubs would to some extent in the manner of their business operation lose their individuality. I couldn't go for that.

Q. You wouldn't favor it? A. No.

Q. But it is a feasible system, isn't it, even though you might personally be disinelined to adopt it if it were a matter of our own free choice? A. It might be feasible.

Q. Now let me ask you about another possible system. Suppose that the reserve system as it exists today were to remain the same in every particular with this one exception: That if a player and a club, prior to the [1416] commencement of a season, were unable to agree on the salary that should be paid the player for that season, then either the club or the player would have the right to have the dispute arbitrated by an impartial arbitrator with that arbitrator to choose between the figure suggested by the club and the figure suggested by the player.

Would you say that that system as I have now described it would have a beneficial or a detrimental effect upon baseball or would it have no significant effect? A. As an opinion, I am not certain that arbitration in the manner you have described would be good, but it might work.

Q. You are not sure—you are not certain, to use your word, whether it is good or bad, is that right? A. But it might work.

Q. All right.

Mr. Topkis: May I take just a moment, your Honor?

The Court: Of course.

(Pause.)

Q. What is the form of business enterprise which owns the California Angels? A. It is a broadcasting business.

Q. It is a corporation? [1417] A. Correct.

Q. Is it a publicly held corporation? A. No.

Q. How many stockholders are there? A. There are two.

Q. Incidentally, does that corporation own any radio or television franchises in Los Angeles? A. Yes, radio and television.

Q. Are the games of the Angels broadcast on either of those stations? A. Both.

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[1426] Q. Mr. Rynolds, we were talking before the recess about the possible adoption by baseball of a system akin to football's whereby the player would have the right

to play out his option and then approach other clubs to hire him. You said you were concerned about the possibility of such a rule being adopted, is that right? A. Correct.

[1427] Q. You don't think that the adoption of such a rule would have any adverse effect upon the integrity of baseball any more than it has had an adverse effect upon the integrity of football, do you? A. Well, there are more players involved in baseball, the average baseball club, than would be in football and to that extent it might involve more of the integrity of baseball.

Q. But only to that extent, is that right? A. I just don't know.

Q. That is the only possible concern that you would have at this moment, is that right?

Mr. Kramer: The witness said he didn't know, your Honor. It seems to me that is an answer.

The Court: Sustained.

Q. You say there are more players involved in baseball than in football. How many players are there in the major leagues in baseball? How many teams are there, rather? A. There are 24.

Q. 24 teams. And each team during the season has a roster of 25 players? A. 25 playing roster.

Q. And in major league professional football, how [1428] many teams are there? A. There are 40.

Q. How many teams? A. The teams, 26, I believe.

Q. 26 teams, and each team during the season has a roster of 40, doesn't it? A. That is correct.

Q. Excuse my doing a little arithmetic. According to my arithmetic there are in consequence during the playing season 600 players on the rosters of professional baseball, and 1040 on the rosters of professional football? A. If you take the total player personnel of the average baseball club, you get into areas of 120, 30, 40, 50, 60 players.

Q. You mean down in the minor leagues? A. Yes.

Q. We are talking only about the major leagues. I am talking only about the possible adoption of this rule in the

major leagues, and there you would agree with me, would you not, that the number of players in the major leagues active during the playing season in baseball is only about 60 per cent of those active in football? A. The players' limits.

Q. Very well. And you are convinced, are you not, [1429] that professional football today operates at the highest level of integrity?

The Court: You already covered that.

Mr. Topkis: All right, your Honor, I apologize.

The Court: Don't apologize. I allow the widest latitude because I want all sides to have their say, and I might as well say at this point that strictly speaking we have allowed answers to go upon the record which strictly speaking, if we worshiped procedures above substance, we would not have permitted, but which I felt nevertheless would have been developed by subsequent questions anyway, and as long as the answer does come within the purport of the question, I have allowed it.

And why? To enable both sides to have as complete a record as is humanly possible.

Very well.

Q. Mr. Reynolds, it has been suggested here that a baseball player who enters the major leagues and plays there for 60 days at least has an average life in the major leagues of four and three-quarter years. Does that accord with your understanding of the facts? A. Something like it.

Q. Let me ask you, sir, to consider this possible [1430] modification of the reserve system as it exists today.

Suppose that the system continued in every respect as it does today with this one exception, that at the end of five years in the major leagues a player were free to negotiate with clubs in the other league from the league in which he was then playing for his furture services, and could be hired by one of those clubs if it were so minded.

I ask you, considering that assumption, that one change in the reserve system as it today operates, whether that

would have an impact on baseball that would be harmful, beneficial or immaterial? A. I think it could be harmful.

Q. It could be harmful. Would you tell us the respect in which you think it could be harmful? A. On a given club you might have in a period of time in a given year five, six or seven players that are involved. If you run that through the 24 clubs, each of whom in accordance with time I think would run into or have available the number that I have given, I think there would be a real problem.

Q. Why would there be a real problem? How would it manifest itself? A. Because I have five or six players that could be involved and your playing manager, your coaching staff, [1431] wouldn't know what personnel under those conditions he might have to rely on. He might find his ball club that he has built suddenly in a state of collapse. He might not be able to field a ball club that would be competitive. I think there are problems.

[1431] Q. Let me ask you to make another assumption, and that is that the club for which a player had been playing would have the right to match any offer made for that player's services by any club in the other league. On that further assumption, would you think that there would be any or could be any detrimental effect? A. I think it is a difficult assumption to draw. It is difficult for me to make. You may have a player of a calibre and a position that you might not be able to match.

Q. You might not be able to match the salary that another club might offer, is that what you mean? A. I am talking about the quality of player.

Q. You mean if you lose the player? A. Yes.

Q. You might not be able to find an adequate substitute? A. Yes, or vice-versa.

Q. I am not sure I follow you. I say if you lose the player, you might not be able to find an adequate sub-[1432] stitute, is that your concern? A. That is my point.

Q. But if you had the right to match the salary offered the player by another club, then you could keep him. I ask

you so to assume. In that circumstance would there be any detrimental effect on baseball? A. I think it possibly could.

Q. It possibly could. What possible detrimental effect do you envisage? A. Again I think you get back to the quality of the players that are involved under such an instance, and whether it would be possible to match the quality with the quality with or without the salary consideration or saying that it is equal, you still, I think, have the problem of matching quality for quality.

Q. Perhaps I am not making myself clear, Mr. Reynolds. I am asking you this: If you have the right to keep the player provided you pay him the salary another club in another league is willing to pay him, then there is no quality problem, is there? A. Perhaps not.

Q. And you could field a team, the same team you had fielded before, provided you were willing to pay the players what another club might be willing to pay them. In that [1433] circumstance can you envisage any detrimental effect on baseball? A. I just don't know.

Q. All right. Now, you said yesterday, I believe, that if the reserve system were eliminated or very substantially modified, you would fear that the wealthier clubs would hire all the best players. Was that your testimony? A. I think that I said there would be or there could be a bidding contest.

Q. Yes, there could be a bidding contest, and the consequence of that bidding contest would be what? First let's consider the players. What would be the effect on the players of that bidding contest? A. Some players might benefit but it seemed to me that you might set up the machinery here to ruin baseball, and if you ruin baseball you are not helping the players in the final analysis.

Q. How would you ruin baseball? A. Well, under this condition of open bidding you might find in a period of time two or three clubs with the ballplayers.

Q. You might find that? A. Yes.

Q. It is equally possible, however, that those two or

[1434] three clubs would realize that if they amass all the best players nobody would be able to play against them, and no fans would come out to watch their games, isn't that right? A. I don't know that I could buy that.

Q. Would you agree with me that it is a very real possibility? A. No, I don't believe I could.

Q. Let me put it to you this way as a businessman. You are connected with the Angels. If you could hire the nine best players in the majors, would you run right out to do that? A. We probably wouldn't because I don't think we can afford to do it.

Q. And if you could afford to do it, would you do it? Would you think that would be the best way to maximize your earnings as a clubowner? A. The temptation might be pretty great to win that pennant, and win that World's Series. This is a conpetitive kind of thing and competition running deep in the bodies and skins of some of these baseball owners, most anything might happen in a short period of time.

Q. Most anything might happen, but I am asking you to consider what would be most likely to happen. You would agree with me, would you not, that it would be pretty bad [1435] business to go out and try to buy up all the best players? Don't you agree with me? A. I think it would be bad for baseball.

Q. And it would be bad for business, the business of baseball, wouldn't it? A. On a long-range basis, yes.

Q. Do you think that the owners of baseball clubs are poor businessmen? A. I think they are good businessmen, but they are all competitors and they want very much to win that pennant.

Q. And your fear is that their desire to win the pennant might triumph over their business instincts, is that right? A. I think that is a possibility.

Q. It is equally possible, though, that their business instincts would triumph, is it not? A. I don't know.

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[1451] Direct Examination By Mr. Hadden:

Q. And did the American League subsequently award to you an expansion franchise in Kansas City? A. Yes, sir.

Q. What was the purchase price which you paid for that franchise? A. Well, approximately $6 million. It varies to 5¼ for players, player contracts, plus various other payments, but it is a little under $6 million.

Q. And has there been a need to make further investment in the ball club since that time? A. Yes, sir.

Q. That was in 1968, am I correct? A. January 11, 1968, I was awarded it, and we started our minor leagues in '68; we played our first major league season in '69.

Q. Are you able to give the Court an estimate of what your aggregate investment in the baseball club is at this time? A. Approximately 9½ million dollars.

Q. When you were considering the investment in the Kansas City Royals baseball club were you in a general way familiar with what is known as the baseball reserve system? A. Well, not at first.

Q. But prior to the final decision to make the invest-
[1452] ment, did you become familiar? A. My lawyer brought it to my attention when I discussed with him my program or ideas for developing a winning team in Kansas City, and he brought to my attention the so-called reserve clause.

Q. And what did you understand the reserve clause to consist of at that time? A. At that time that basically if you spent money in developing players that you had the right to retain their contract for playing baseball.

Q. In the discussions which you had with your attorney, was there any discussion of baseball's status under the antitrust laws? A. Yes, sir. He brought out the fact that there was always the possibility of changes in the player situation due to the Players Association, and he mentioned that baseball as a business—and I am not sure of my wording being exact, but I believe that it was exempt from the antitrust aspect of business.

Q. And as you made your investment in the Kansas City Royals Baseball Club did you rely on your understanding with regard to the antitrust laws which you have just described? A. Yes, I relied on my lawyer's opinion about it, which he stated that in his opinion that I could make such an invest- [1453] ment.

The Court: Yes, but it was your money and Mr. Hadden's question to you is, before you parted with that money, before you undertook that investment, did you rely on what you have already told us with regard to the antitrust feature? Was that an inducement? Did that mean something to you? If so, how much did it mean to you?

The Witness: May I clarify it in this way, sir: I spend millions of dollars on my judgment plus what my lawyers tell me about certain legal facts and I have done it with this particular law firm, I have done it many, many times, more so than baseball, and when he explained the reserve system to me, I was willing to make the investment under the interpretation I received about the reserve system.

The Court: That is what he asked you.

Q. And had you not had that understanding with regard to the reserve system and the antitrust laws, would you have proceeded to make the investment? A. I don't believe so, not $6 million.

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[The direct testimony of John J. Gaherin, found at pages 1555 through 1629 of the trial record, is printed beginning at page 489 of this appendix.]

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John Clark, Jr.

[1682] Direct Examination By Mr. Hoynes:

Q. Dr. Clark, are you generally familiar with baseball's reserve system as it is described in the various rules and regulations of baseball that we described earlier in your testimony? A. Yes.

Q. Would you just briefly indicate to us your understanding what the reserve system is? A. Well, the essential ingredients of it are that the club who has a contract with the player has an option of signing him for the next year and also has the ability to transfer a contract to another club. In other words, they control the player's contract and the player has to play for them under the contract or to whoever they assign the contract.

Q. In effect, that is career-long control at the club's option? A. Yes.

Q. Dr. Clark, were you in the courtroom when Mr. Nathan testified for the plaintiff? A. Yes.

Q. And have you subsequently reviewed him testimony in transcript form? A. Yes.

[1683] Q. You will recall that Mr. Nathan testified that in his opinion the reserve clause had a depressing effect upon a player's salary levels. I refer to pay 387 of the transcript.

As I also understood Mr. Nathan's testimony, he had no baseball salary data, and therefore had not been analyze that data to test his conclusion. Have you analyzed what you believe to be the relevant data concerning baseball players' salaries? A. Yes.

Q. Does your analysis and study indicate to you that Mr. Nathan's conclusion that players' salaries are depressed by the reserve clause is correct? A. No.

Q. Would you explain your answer? A. The analyses that we have just discussed in our report show, first, in respect to average salaries, that the average salary of baseball players on the rosters increased at a reasonable level in respect to other income and salaries in the economy, and in respect to those players who are well established regular players that their salary increases were really quite substantial in absolute terms and in relative terms.

Q. Did you find any evidence in that study of this [1684] depressive effect that Mr. Nathan referred to? A. In respect to overall salaries, no.

Q. Mr. Nathan also testified at page 393 of the transcript that he believed that the bargaining power between a club and the player was, and I quote, "totally and completely unbalanced."

Would you agree with that conclusion? A. No.

Q. And would you expand? A. The owner or manager of the club needs to sign contracts particularly with the stars and with the established players. The star, of course, cannot play for anyone else, but his services are substantially needed by the club in question, so that there is a very strong need to not only have the right to bargain with the player, but to come to terms with him. You don't have access—if you cannot come to terms with that player, it doesn't mean that you can then go out and negotiate with other players belonging to other clubs or who are contracted to other clubs, so it is not a question of, if not coming to terms with him, that you can fill the need some place else easily.

So you really have a very strong need, first, to get the player to come to terms and hopefully in reasonable time so that the player is not completely dissatisfied. [1685] It would be much preferable to have a player who is satisfied with his salary and who is eager to go ahead with the season. Certainly few club owners could really wilfully not come to terms with the star player without substantial player reaction, so there is no question that the players do have some things working for them in this bargaining process.

Q. What does the salary study that you made indicate in terms of relative bargaining power to you? A. Well, that established players have received various substantial increases and as warranted by the performance.

Q. Dr. Clark, do you believe that collective bargaining can have an impact upon the process of salary determination? A. Yes.

Q. In what particulars? A. Well, certainly the collective bargaining by establishing minimum levels or increasing

minimum levels raises the overall average by raising the minimum and, of course, you start then on further advances from a higher base. In other words, instead of starting from $10,000, you will be starting from $12,000 for future negotiations, so this has an effect which is carried on in future times.

Mr. Hoynes: Your Honor, I would like to solicit a [1686] stipulation from the plaintiff, if I may, here. We have made no calculation of the dollar effect of the newly announced collective bargaining agreement, but I do understand that the Players Association—I believe Mr. Miller himself—has made such a calculation and it has been reported in the newspapers. If there is no objection, I would like to have a stipulation of the amount which the Players Association has calculated to be the effect in dollar terms of that agreement.

The Court: Mr. Topkis.

Mr. Topkis: I will have to confer with Mr. Miller, if I may, your Honor, for a moment?

The Court: Certainly. Take your time, Mr. Topkis.

(Pause.)

Mr. Topkis: If your Honor please, I am advised by Mr. Miller and, of course, his statement is accepted by the plaintiff as entirely accurate, and we are willing so to stipulate, that at a press conference recently he estimated that the total cost to major league baseball of the various increases provided for in the new agreement, for example, such increases as that in the minimum player compensation, increased meal money, increased travelling expenses, at cetera, over the three-year life of the contract, will aggregate approximately $4 million.

Mr. Hoynes: I would like to make one point clear, [1687] and that is that among these various benefits no pension benefits are included. The pension benefits are included in a separate negotiation.

Is that correct, Mr. Miller?

The Court: No, don't ask Mr. Miller. Ask counsel.

Mr. Hoynes: Mr. Topkis?

Mr. Topkis: We will so stipulate.

The Court: So stipulated.

Mr. Hoynes: Thank you.

Q. Dr. Clark, what have you observed with respect to the frequency of salary decreases or cuts in your study? A. Well, on the analyses we did of the players on the roster, both in 1965 and '69, there were ten players who received cuts as of '65 and '69, and for the 209 players between '65 and '70, only one player, under the analysis, had a lower salary in 1970 than 1965.

Q. Dr. Clark, in answering several of my previous questions about relative bargaining power, you referred to the star player. What is the position of the less-than-star or marginal player under the reserve clause? What, in your view, based upon the study that you have made, is his bargaining position, and what is the effect of the reserve clause on his salary level? A. Well, his bargaining position is obviously not as [1688] great as the stars. In fact, it is not very strong at all. I think it is very possible that he receives certain benefits from the collective bargaining between the Players Association and the clubs, and I think if he stays in the major leagues ordinarily he is given increases from year to year of a modest nature, depending on how fast he improves. But as far as bargaining power goes, the star player obviously has the much greater bargaining power.

Q. Would the marginal players' bargaining power be more or less or about the same, in your view, in the system without a reserve clause? A. Well, doing away with the reserve clause wouldn't improve his bargaining position. In fact, the question of bargaining implies that there is always the effort to get the lowest possible salary at which you can get the player to sign, and I don't believe that is the situation in the bargaining that goes on. The player's performance has a great deal to do with what he is offered,

and I think the usual situation would be that the star player who does well gets substantial increases as a result, and the marginal player or the new player, as he progresses along, is also given increases, but if it became a question of having to bargain with each star player to the nth degree, I would think that this bargaining would be carried on toward the less gifted player, who is [1689] less able to bargain. So I would expect that his position, if anything, would be hurt.

Q. Hurt by the abandonment of the reserve system? A. Of the reserve clause, yes.

Q. It has been suggested by attorneys for the plaintiff in several of their questions, although I don't believe there has been any testimony to this effect, that somehow the players are asked under the present system to subsidize that system by accepting less money or by relinquishing some of their bargaining power. Do you believe that your study reveals any subsidy by the players of baseball in the present reserve system? A. Well, none of the figures I have would indicate there is any substantial subsidy. In respect to the salary levels of the real star players, I would think that over a period of years, as a player becomes a star and becomes established, his salary does increase each year until it reaches some level, but is rarely cut after that, so his salary level is established and is continual over a period of time.

Q. So that his salary level remains high even after the economic bargaining justification for it has diminished? A. Yes; in a sense he is being paid for past performance, but he may still be a considerable fan favorite and help attendance and so on, so he does have a value, although not [1690] perhaps not as great on the playing field.

At the lower level, I think at the minimum level, and slightly above, that it is hard to find a subsidy there because the player isn't as yet producing much more, I would say, than he has been paid. There is an in between point where there is no question but that a number of players

who find themselves after two or three or four years in the major leagues and are really quite good, they become stars, there is prbably a period of two or three years in which their performance exceeds what under no reserve clause they could get with another club. In other words, there is probably a brief period in there in which the player is contributing more than he really perhaps might be able to—

Q. You say a previous period. I take it—

Mr. Topkis: Could we have the answer finished?

The Court: Yes. Would you let the witness finish.

Mr. Hoynes: I am sorry.

A. In doing the salary analyses and going back to the basic records, I was impressed by the number of instances in which the number of players had very substantial increases over a period of three or four years. Whether, with no reserve clause, it might even have been greater, I don't know. It is possible. But they quickly get up to the—I can think of several that have gotten up to the 60, 70, 80,000 level [1691] from a very low level just in a period of three or four years, so they do get up there very quickly. These are the critical players in terms of building a team, in terms of having a strong team, and once they get up to the $80,000 level, $70,000 level, $90,000 level, they are rarely cut back, and so they do benefit over a period of time then for having reached that level.

Q. Looking at their careers, the players' careers in their entirety, the beginning years, the years of rapid increase, the years in which their salaries are maintained on into the twilight of their career, do you find overall any subsidy on the part of the players through the reserve system to baseball? A. Well, from the average salaries they receive over their career and from the benefits they received overall, it looks to me like they are reasonably well paid, and how you define a subsidy in those terms, I mean, I just don't see.

Q. Dr. Clark, do you see any adverse effect upon the players' collective bargaining power arising from the oper-

ation of the reserve system? A. No. As far as I can see, they have an effective collective bargaining setup.

Q. Turning again to your report, Dr. Clark, have you made any calculation of the pension benefits of major league [1692] baseball players and the value of those benefits? A. Yes.

Q. At what page of the report would you find that comparison? A. Page 7.

Q. Would you care to explain your analysis? A. I took several examples of various years of pension vesting, such as 5 years, 10 years, 15 years and 20 years, and using the tables contained in the pension benefit book, put down the retirement benefit at age 50 and at age 65 that a player with five years, 10 years, 15 years and 20 years would be entitled to.

And as you can see on page 7, a person with five years of pension credit, if he retires at age 50, would receive a monthly benefit of $300. If at age 50 a person wanted to buy the same benefits from the insurance company he would have a single payment that he would make at that time of $57,900. Well now, obviously, that payment is made at the time of the player's playing, and so I went back to find out what the cost would be if the player completed his five years at age 25 and the payment was made at that time.

Q. The payment being the payment that would produce monthly benefits of $300? A. Producing at the retirement age of 50 $300 a month. [1693] The payment that would be made at that time, at age 25, would be $18,300.

If he completed his five years at age 30, since that five years is past and is less time for the payment to be used to earn an income for the insurance company and so on, it would increase to $22,900.

Another example, if you take 20 years of pension credit, retirement at age 50, the monthly benefit would be $800. The single payment cost that would be made at the time to produce those benefits for the rest of the person's life

would be $157,200, and I assume that the person would probably be close to 40 to complete 20 years of pension credits. If the payment was made at that age, age 40, to produce those benefits, retiring at age 50, it would be $97,900.

The same comparisions were made if the player waited till age 65 to retire. For his five years of pension credit he would then receive, having waited longer to get his pension, he would then receive $772.56 a month, and I went through the same comparison. If at age 65 he wanted to buy monthly benefits of $772.56, you would have a single payment at that time of $108,800. However, if you completed your five years at age 25 and then waited until age 65 to receive your benefits, the payment required at age 25 for the future benefits at age [1694] sixty-five is only $14,800.

So you have this going through all the way. Again—

The Court: May I interrupt you? I think I got it. Now, bear with me for a minute. Are you saying, in effect let us take the first line. Retirement at age 50, pension years five, retirement at age 50, the monthly benefit is $300.

The Witness: Yes, sir.

The Court: That to buy $300 a month for the lifetime of that particular player, with the monthly payment at $300 beginning at age 50, would cost $57,900?

The Witness: If the payment is made at age 50.

The Court: Right. If the payment, however, were made at age 25 in order to get $300 a month beginning with age 50 for the rest of the player's life, it would cost $18,300?

The Witness: Yes, sir.

The Court: And that is the sort of formula that you have got all the way down.

The Witness: Yes, sir.

The Court: All right.

The Witness: For example, the very last one on the page, 20 years of pension credit, retirement at age 65, monthly benefit $1,945.11, and that is composed of—the

[1695] pension is in two parts—a guaranteed part and a variable part, but this is based on the current assumption of your earnings on the variable part. If this was completed at age 40, the value of that would be a single payment of $75,900 to obtain those benefits at age 65.

The Court: But if you bought it at age 65, it would cost you $283,000?

The Witness: Yes, sir.

The Court: Okay.

Q. Dr. Clark, do you know how many years of pension credit the plaintiff, Mr. Flood, has? A. I believe it is 12.

Q. With 12 years of pension credit, what would the monthly retirement benefit at age 65 be? A. It is $1,625.11.

Q. And do you know approximately what the single payment cost of that benefit would be at age 65? A. We have no interpolate between the 10 and 15 years here because I only obtained this for the five, ten, fifteen or twenty years, but it would be somewhere around $230,000

Q. And using the same interpolation process, what would the single payment cost of those benefits be if the payment were made at age 32, which I believe is Mr. Flood's current age? [1696] A. That would be interpolating between, on that line between, oh, around 30 and 35, so it would be somewhere around $40,000.

Q. Thank you, Dr. Clark, have you analyzed the value of the other benefits included in the player's benefit plan, that is to say, benefits other than pension benefits? A. Yes.

Q. Would you describe those benefits briefly and indicate their value? A. Well, an active player who is on a major league roster for more than 60 days and remains active, meaning on the roster, is entitled to $50,000 life and an accident and dismemberment insurance coverage.

The Court: You are going fast. Is entitled to?

The Witness: $50,000 life insurance policy, which also includes coverage for accident and dismemberment in case he is injured.

The Court: Yes.

The Witness: And the premium cost of that is $216 per player.

Q. That is assuming a group rate, I take it. A. Yes. This is the actual cost of the benefits that the players currently receive.

Q. The annual cost to the plan? [1697] A. Yes. The player and his family receive health care coverage at a premium cost to the clubs of $392.

Q. But again that is an annual cost? A. An annual cost, and there is also dental coverage at a premium cost of $134 annually, so the three premiums have a total value of $742 annually for each active player.

Q. So that in addition to pension benefits there are $742 worth of other benefits purchased on behalf of that player each year? A. Yes. It is my understanding that the dental coverage cost is going up.

Q. Dr. Clark, what amounts have the clubs actually contributed to this benefit plan in the most recent years, '67, '8 and '9? A. According to the information supplied Arthur Andersen, and which is contained in their report, pension fund payment in 1957—this is at the bottom of page 8—pension fund payments were $4,132,000 in 1967, $4,173,000 in 1968 and $5,450,000 in 1969.

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[1725] Q. Dr. Clark, Mr. Nathan in his testimony indicated that the salary offer which a player received, were he free to choose his employer, would be the principal determinant in his selection process. Would you agree with that conclusion? A. Yes.

Mr. Hoynes. I refer, your Honor, to page 430 of the transcript of Mr. Nathan's testimony for that point.

Q. Dr. Clark, from your experiences in baseball, your observation and reading of some of the testimony in this case and your discussions with baseball owners, what would you

conclude about the desire of each club to build and field the best possible team? A. I think there is a very strong desire to field the strongest team that one can.

Q. There has been testimony in this case from other baseball witnesses, with which I am sure you are familiar, to the effect that if the players were free agents, that is, able to choose their employer, there is the possibility that [1726] the better players would be attracted to the more wealthier clubs and that competition would be unbalanced.

Do you agree with that conclusion? A. Yes.

Q. What effect does your study of the revenues and profitability of the various major league clubs indicate with respect to that conclusion? A. Well, there is a wide divergence in the income available to the various clubs to spend on players.

Q. Dr. Clark, it has been suggested, again I think not in testimony but more in questions from counsel for the plaintiff, that if the wealthier clubs' activities, that is to say, their efforts to attract the better ballplayers, would, in fact, cause the better ballplayers to be concentrated in a few clubs, and if this in turn would cause league competition to decay and the league to die, the wealthier clubs would have enough business sense not to pursue their efforts to the fullest in getting these better players, so that the league could prosper. Notwithstanding their ability to attract the players, they simply would not use it to the fullest and would exercise a kind of self-restraint in order to keep competition alive. As a business consultant, familiar with baseball operations and business practices generally, do you believe that balanced league competition could be maintained [1727] through a process of self-restraint of the kind I have described? A. No.

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[1730] So may I ask you now, Dr. Clark, to give us your opinion as to the effect of the reserve system on the mar-

ginal or fringe major league player as opposed to the star player?

A. It was my opinion that the marginal player would not be in a particularly strong bargaining position, whether he was bargaining with one club or several clubs; that actually to the extent that he has a career of several years extending on to six or seven years with a given club, the general practice that I observed in the salary histories is to pay him at least as much as he made last year and with some fairly regular increases of a modest amount, so it was my opinion that I thought perhaps he fared as well if not better under this system as he would if he had to bargain individually with a given number of clubs.

Q. Dr. Clark, as a business analyst who has observed the baseball scene with some closeness and care, have you observed any unique features of baseball as an economic enterprise? A. Yes.

Q. Would you describe to the Court and explain their [1731] experience and the economic analysis of baseball? A. One of the main things that strikes me about baseball is that in business generally or in industry each organization is an entity to itself more or less. It is seeking to profit as well as it can and attempts to compete more effectively than the other companies in the field, and its main concern is with improving its own earnings and having a good, strong growing company. In other words, it looks out for itself pretty much.

In baseball, for the leagues to be successful, you have to maintain teams, playing rather lengthy schedules, and there is a strong desire to win, and yet there has to be this concept of not having too many weak teams in the field. There has to be a balance between wanting to win and trying to make sure that you win as a clubowner and at the same time maintaining conditions in which the weaker clubs don't get too weak because certainly one of the effec-

tive factors which increase attendance is a close race and competition.

So it is a unique situation in that you both want to beat your competitor and yet at the same time you want to keep him reasonably effective. That is the main difference.

I think other organized team sports may have the same situation, but in respect of baseball it has been more of my concern than the other sports.

[1732] Q. Are there also unique aspects of the baseball business in terms of the cost and manner of developing personnel? A. Yes. For the five-year period covered by the Arthur Andersen figures, player development costs and cost of managing minor league operations together accounted for 26 per cent of operating revenues. This is so far larger than any other organization that I am familiar with that it impresses me as being a unique characteristic where one quarter or more of both leagues' revenues are dedicated to developing new players and bringing them up to major league status. This is quite different than the ordinary industry.

Q. Mr. Nathan testified at pages 436 and 437 of the transcript that he knew of no other business enterprise with a training cost approaching that of baseball. Is that true in your experience as well? A. Yes.

Q. With respect to your testimony about the proportion of trainees who graduate to become effective major league employees, is there any uniqueness to baseball in that regard? A. Yes. As I mentioned in the report, if the experience in the future is anything like it has been for the years we studied on player disappearances, something like 7 per cent or less of the players who are initially signed up will make it to major league rosters and the roster date I am speaking [1733] of is as of August 31, 1965. That is a remarkably small percentage. I would think in our experience within the company, on a training basis, that we expect at least 50 per cent success, and there is a success ratio of 7 per cent.

Q. Perhaps I misunderstood you. Did you say that the data was based on the number of players that made the major league roster in August 1965 or for several years? A. No, it is over the period, but each year was as of the same date.

Q. I thought you mentioned only the one year 1965. You meant the range of years. A. Yes, the range of years.

Q. Dr. Clark, Mr. Nathan observed in his testimony at page 391 of the transcript that player-club relations in baseball were, in his experience, a unique form of employee-employer relationship. Do you agree with that and do you know why? A. Well, I agree, yes, I do agree, and it does relate to the question of the problem of maintaining control over players and training players and having put a great deal into the training of the player and trying to maintain team operation.

Q. In other words, these unique factors that you mentioned before? [1734] A. Just what we have been talking about. It is a question of trying to maintain competitive team operations, and the fact that a great deal has been put into player development costs and there is a need to try to maintain a balance.

Q. And you think these factors offer the reason for the unique player-club relationship that we find in baseball? A. Yes.

Q. Dr. Clark, turning to your report again, have you made an analysis of baseball attendance over a period of recent years as a function of certain criteria, including the population of the various major league cities and the performance records of the clubs? A. Yes. Starting on page 26 we made an analysis, dividing city sizes as over 4 million, 2 to 4 million, and under 2 million, and the city population is defined as it is defined by the bureau of the census of the metropolitan area population. The variation between attendance and standing is fairly substantial. On page 26 I point out that for cities of over 4 million population 36 first division finishes between 1960 and 1968 resulted in at-

tendance of over 1 million 27 times or 75 per cent of the time.

If you go on down a couple of lines for cities with [1735] less than 2 million population, 27 first division finishes resulted in attendance of over 1 million 15 times or 56 per cent of the time, in other words, something over half the time for the smaller city and three-quarters of the time for the larger city.

Actually, at the bottom of the page, I point out that overall, teams in cities of over 4 million population enjoyed attendance of over 1 million 41 times and less than 1 million 25 times over that 1960 to '68 period.

However, if you go to the cities below 4 million, you have attendance of over one million 47 times and attendance of less than one million 61 times. In other words, four more attendances of less than one million than in the case of the larger city. Actually, this is summarized somewhat on page 28 in which the cities are divided into the population and this shows on the chart, for example, just what I quoted a while ago: Under two million, the first division is over one million attendance 15 times, and then if you go over in the column to under one million attendance in the first division 12 times. That was the 15 and 12 referred to earlier. Just as for the four million size city, over four million, in the first column you had first division finishes that resulted in over one million attendance 27 times and under one million nine times. That was the same figures referred to earlier.
[1736] I think one of the things that comes out of this is the importance of some of the new franchises and new stadiums.

If you notice, on the first line there is a second division finish under two million population ten times despite a second division finish that was over 1 million attendance. That was accounted for mainly by the Astros and the Astrodome and the Minnesota team and the new location in Minnesota.

In the over four million, you see nine second division finishes which resulted in over a million attendance despite

the fact it was second division. Many of those are for the New York Mets in this location and with a new stadium, one attendance of over a million before the new stadium, all of them after the new stadium. And when the California Angels were in Los Angeles they had some over million attendance despite the fact they were in the second division.

But it really illustrates the tremendous impact of a new stadium, particularly in a location like the Astrodome.

Q. What does it indicate in terms of the variations in potential revenue and profit pictures for the major league [1737] clubs? A. For the teams in very large cities over four million, the prospects for profit from attendance are much greater than they are in the smaller cities. When you go to cities below two million, you frequently do not even have over a million attendance even if you are in the first division.

So there is again a great difference in the capability of clubs in those regions to earn money from attendance.

Q. Dr. Clark, if 24 competitors in baseball or in any other kind of enterprise were free to compete in all respects over a period, say a decade or longer, as a professional business analyst, what do you think would be the chance that after this period of time had occurred that the 24 entrants or competitors in the field would find themselves of roughly equal force in the market place? A. Well, I think it would be unlikely. It hasn't been the case in industry generally or any form of competitive enterprise that I know of that everything ends up just equal.

Q. What is the tendency normally in a competitive situation? A. The tendency is for several organizations, clubs, companies to become quite large and account for a [1738] substantial part of the revenue. There would be an intermediate number of secondary size, of less capability, and several would disappear. A number would disappear.

Q. If that were to happen in baseball, that would mean certain clubs would disappear and the pleasures of major league baseball would be denied to the cities where those clubs were located, is that true? A. Yes.

Q. Now focusing on the baseball situation particularly, to particularize the general question, given the attendance analysis you have made and the revenue analysis you have made and testified to, what in your opinion is the likelihood that the major league baseball clubs would stay in relative competitive balance without artificial rules and restraints to even out their activities? A. Taking into account the substantial differences in revenue available from operations and the desire of clubs to win, I would expect that there would be an emergence of several very, very strong clubs and others much less strong.

Q. Would you expect the disappearance of some clubs? A. Yes, I would think so.

Q. What, then in your opinion is the position in terms of necessity and appropriateness to the baseball [1739] industry of the present reserve system arrangement? A. I think the reserve system has contributed to the maintenance of league play and has helped to prevent the disappearance of clubs from completely being unable to compete.

Q. Dr. Clark, as a professional business consultant and analyst, what would be your opinion of the result that would ensue if the reserve clause were to be eliminated entirely as Mr. Flood has asked and every player were declared a free agent able to negotiate at any time with the club of his choice? A. I think that unquestionably the stronger clubs would become stronger and the weaker clubs would become weaker and perhaps not be able to operate any longer.

Q. In your view, Dr. Clark, is the choice limited to or the competition limited to the ability of the individual club to pay or are there other aspects involved such as business opportunities in various cities and other matters of that sort? A. Well, I think it is clear that a player who is a star in the New York area, for example, has opportunities for a desirable income just because of the opportunities available in New York as a very major city on advertising and appearances and speeches that he would not get [1740] in

San Diego. And again, Los Angeles versus San Diego or Los Angeles versus Milwaukee or Chicago versus Seattle.

[1740] Q. So that even with equal salary offers there may be other factors such as the opportunities for outside income that a player would consider, in your opinion? A. Yes, definitely.

Q. But isn't it true, Dr. Clark, that in order to maintain a league, someone, including a number of highly skilled players, must in fact play in San Diego or Philadelphia, if you will? A. Yes.

Q. At various times during the course of this trial, Dr. Clark, the plaintiff's attorneys have suggested a number of modifications or variations in the reserve system. I would like to take you one by one through those proposed modifications and get the benefit of your analysis of each one of them strictly as a business analyst and economist.

For example, it has been suggested that instead of declaring all of the players free agents at one time so there would be 600 free agents tomorrow or at the end of the season, on the major league baseball market, that the players would become free agents only once or a limited number of times during their career, at certain intervals [1741] in ther career. I believe five-year service has been mentioned by the plaintiff. Would you comment on that variation? A. Actually, a five-year interval or assuming it is after a player has had five years of organized baseball he becomes a free agent, certainly a number of the players whose salary history I have reviewed, that's a very critical time in their career. It is quite frequently the time they do start receiving very substantial increased salaries. In other words, by that time they have either proven that they have capabilities or they probably don't have superior capabilities.

Q. Dr. Clark, are you referring to five years of baseball service or five years of major league service? A. It depends how long it takes a player to get to the major leagues. It could vary. Certainly three, four and five years after you have been in the major leagues that's the time in

which you really demonstrate in many cases whether you are going to be a real star, a superstar or more or less less of a star player, an ordinary player.

Q. What would be the effect of having players of that level become free agents? A. This would be a time—

[1742] The Court: Sorry, Doctor. Your mind is so alert that you anticipate the complete question and you are looking at the questioner and he at you and you don't see the sad expression on the face of the court reporter who is appealing to me. So go slowly.

The Witness: Yes sir.

Q. Would you like the question reread, Doctor? A. No. This is a period of time in which the player has demonstrated his capabilities and so, if it is at the same time he becomes a free agent, this would be very ideal for the wealthy club, the club that could attract him to do it. So I would think that as compared with declaring everyone a free agent at once or doing it at the end of five years, it would have the same effect over a period of time.

In other words, the wealthy club would get the good players except this time they wouldn't make any mistakes.

Q. I take it you mean that by they would know which players were going to make the best contribution? A. They would have a very good idea, yes.

Q. Dr. Clark, it has been suggested that some of the ill effects that could be caused by that sort of a system would be eliminated if the original club had a right of first refusal, that is to say, the right to meet any [1743] salary offer that a player might receive as he shopped around and therefore retained the player's services. In your view, would such a right of first refusal cure the ill effects which you have described? A. Well, with the difference in the level of resources that I have referred to several times. I would think that the wealthier club would still be able to outbid the other club, the weaker club, for the key players that they want. So I don't see that that would necessarily relieve the situation.

Q. Dr. Clark, it has also been suggested as another check on the ill effects of the proposed modification to eliminate the possibility that the wealthier clubs might corner the talent that a limit be placed upon the number of players, free agent players, which a club could sign.

Suppose, for example, two a year or one a year. What would be the effect, in your view of that sort of a limitation upon the proposal? Would it eliminate the ill effects we have considered before? A. Well, if it's two a year over a five-year period, you would be able to select ten very choice players. I would think that that would be all you would really need to really strenghten your club a great deal. If it's one a year, it would take you longer, but there still would [1744] be an advantage to the strong club just as in the other situation.

Q. It has been suggested, Dr. Clark, that the reserve system could be modified to the players' benefit if the two leagues that have been joined together for the last 60 years or more, the American and National leagues, were separated and would compete one against the other not only for new player talent, but for existing player talent in the major leagues.

What would be your view of such an arrangement? A. Well, the same disparity exists between the income available to clubs whether you are competing with the league or inter-league, and I would think the same effect would result, that the stronger clubs would emerge much stronger and the weaker clubs much weaker. So I really don't see that that would have any different effect.

Q. Another possibility suggested by the plaintiff, Dr. Clark, is something that we have called in a shorthand way a salary minimum escalation system, that is to say, a series of levels, fixed levels. As you know, as you have testified, in major league baseball today there is a minimum salary, a floor. It has been proposed there could be various steps above that tied into longevity and that if a club chose not to pay the player the salary appropriate [1745] to the

length of his service in baseball, that player would become a free agent. Would you give us your view of that possible system? A. The analysis I did of increases in salaries over a career time for players and for the players on the rosters of 1965, who were also on the roster in 1969, and '70—

Q. That would be your Exhibit T? A. Yes.

Q. Defendant Feeney Exhibit T. A. —the progression there was fairly substantial. If the escalation was $5,000 a year, in other words, you start off with 12,000 and the next year the player had to get 17,000 and the next year 22,000 or he would become a free agent, I suspect a number of players would become free agents under that setup because some of the marginal players just would not be paid that much. So a number of players would then become free agents and if they had to sign at that level with another club, it is a question of whether they might be employable at 17,000 for a second-year man, 22,000 for a third-year man, and so on. So there might be more turnover than there is at the present time and some of the marginal players might not stay around.

[1746] If you are talking about an escalation of 13,000 the second year and 14,000 the next year, and 15,000 the next year, I don't see how that would have a particularly negative effect to either party. In the first place, the escalation for most players is greater than that, and if it isn't, I don't see how it would be terribly serious for either side.

Q. Would it have a significant positive effect for either party? A. I don't think it would have a really big positive effect, but I don't see how it would hurt things so badly either. If a number of players were characteristically being kept at this low level, I would say it might have a positive effect in increasing their income.

Q. Have you noted any such characteristic? A. Generally speaking, on the analyses I did, the escalation was more than that. So I don't know that the rule would be affected, but if it was established I don't see how it would hurt either party particularly.

Q. So if the minimum salaries established at the various levels was consistent with the lower reaches of current salary escalations there would be really little effect on the system altogether, and if those escalations were fixed at substantially higher levels there would be [1747] a risk, in your view, that certain of the fringe or marginal players would continue to be unemployable, I think that is the expression you used. A. That is the point, and I don't know what the breaking point would be, but I think many of the marginal players want to become vested, which would be a four-year period—

Q. That is vested in connection with the pension plan? A. Pension. So anything that was set so high it might discourage players being kept on long enough to make the pension vesting period might work to their disadvantage. But this is not something to me that is going to result in the end of league play.

Q. It seems to me from your answer that there is a delicate balance there as to the levels, if any, to be adopted. May I not ask whether in your experience as a business analyst those levels and their effect are the kind of matter that could be resolved most effectively in bargaining between the parties? Is that not a typical subject of bargaining? A. Yes, I would think so.

Q. Another proposal or suggestion, Dr. Clark, is what we have called, for shorthand, the football system.

[1748]. Let me give you a hypothetical example:

Suppose that at the end of any year a player were free to announce that the next year would be his last wit that club and that at the end of that next year the player were free to bargain with any other club in orgniized baseball subject to the right in the Commissioner of Baseball or some panel to compensate his original club for his loss and that such compensation would be assessed against the club with which he contracted after becoming a free agent.

What would be your view of that sort of a system being adopted by baseball? A. I think it would depend on how

many times it happened. If it happened highly infrequently, really highly infrequently, I would think it wouldn't have too much effect. If it happened quite frequently, it would in effect be the same as absolutely open season on players each year.

So it would be between the two extremes. It would either have little effect or a great deal of effect. I think the only problem is when you are putting it in, I don't know how you can forecast what would be the experience. So if you put in such a plan and there were a very large number of players playing out their con- [1749] tracts, it would really be quite serious, and from the standpoint of maintaining quality of competition, again the stronger clubs would attract the better players.

Q. In other words, if a few players played out their options and the system were not availed of to any degree, to any significant degree, by the players you see little if no harmful effect? A. Right.

Q. But if the system were used by a large number of players to obtain their free agency, the effect would be similar to that you observed in the general free agency suggestions we have discussed earlier? A. Yes.

Q. And do you see any way to predict or can you give us and the Court any assurance as to the number of players that might avail themselves over a period of a few years were this opportunity made available in baseball? A. No, I don't know.

Q. Do you think that anyone could predict that? A. No, I don't know on what basis they could predict it.

Q. Another proposal, Dr. Clark, that has been discussed here often has been the possibility of salary arbitration, that is to say, individual salary arbitration, [1750] so that when a player and a general manager reached an impasse of some sort in salary discussions that the matter could be submitted to a third party for arbitration.

Would you comment upon the possibility and feasibility of that working in the baseball context? A. Well, from the

salary reviews, again, that I did, I could see no indication of whether there were a large number or a very small number of serious disputes about salaries or not. I got really no feeling either way that there were a large number of salary disputes or a small number.

I would say that I could see some examples of where a star player was involved and things had reached an impasse, I can't see that it would be so serious to go to abritration or get some advice or opinions on it. But I don't see any tremendous need for it that I ran into in looking at the salary information. The salaries have gone up rather substantially, as I discussed earlier, and if there have been a very large number of disputes which would have led to a need for frequent arbitration, I am not aware of it. But that is a question that again I don't see that necessarily this would be so harmful that some version of it, you know, could not be used.

Q. Dr. Clark, is not arbitration another one of those [1751] matters about which employees and employers bargain collectively in the normal course? A. Yes.

Q. Another thought that plaintiff has given us, Dr. Clark, and one which I would like to have your comments on, concerns the possibility of equalizing the revenues of the various clubs. As you have pointed out and as I believe the plantiff has recognized, there are wide variations in gross revenues and possibilities among the major league clubs which produced this situation where we have wealthier and poorer clubs, each with their own ability to attract player talent in a free market.

It has been suggested, for example, that gate receipts could be shared on something more closely approximating a 50-50 basis between the visiting club and the home club, and it has been suggested that radio and television revenues might be shared on an equal basis among the 24 clubs.

Would you comment on the feasibility and appropriateness of such a step? A. It is my understanding that na-

tional TV income is at the present time shared equally on a per club basis.

Q. Excuse me just for a moment. Do you know what proportion the actual TV income is of overall broadcasting [1752] income to baseball? A. It is slightly less than 50 per cent. I don't know exactly, but maybe 40 per cent, something like that. It is less than half.

Q. Go ahead. A. I think there are several problems in that, one being that the clubs as they presently exist have commitments on stadium leases and have built up organizations with certain expenses, and these are not equivalent one city to another, and yet the clubs are committed to this. There might be a question as to whether some of the clubs under that arrangement could indeed meet all of their commitments.

There is a second case of how much incentive would you remove from a club owner to do the best promotion job in a city if he knew that no matter what he did half of the benefits of his labor would go to the visiting club. I think that really refers to the local TV and radio arrangements, too, that it would discourage a club owner from doing the best job he could.

It would raise a question as to what he might feel or demand that a club owner in another city could do over which he had no control. I don't know what the balance would be, but I know on an equal level it [1753] certainly would have a substantial effect on the activities of some of the clubs. So I would think that there are some difficulties in solving everything by splitting revenues 50-50 all the way down the line.

Actually, I think I mentioned earlier the fact that a number of players would much rather play in New York or Los Angeles, the major cities. There still would be an attraction insofar as which clubs could attract the best players. The factor of outside employment opportunities in New York is greater than elsewhere.

Finally, while I think that a club should depend on the revenue from baseball operations to cover its baseball

costs, I am quite sure that there must be some variation as to capabilities among the owners as to what non-operating investment they might make, in other words, out of their own resources, to again buy players.

But I am not familiar with what the different resources are. I just suspect they are not all equal.

Q. I take it that reaching outside for resources you suggest you could unbalance the wealth of clubs just as surely as the different levels of operating revenue? A. I think that if some clubs did have unequal capital resources that they would have an advantage [1754] there. I said earlier, I think that overall it would be desirable to try to cover your operating expenses out of your operating income and not have a continual input of capital, but obviously some clubs do who are losing money and still continue to make some of these investments in players.

Q. Dr. Clark, with respect to the local television and broadcasting arrangements that the clubs have, I know that you are familiar with them in general, in a general way. Do they lend themselves to a national partnership perhaps similar to a network or otherwise which could be neatly devised into 24 parts? A. There is a tremendous variation from city to city as to the hinterland served by the radio and TV network, and advertisers generally speaking are motivated in the sense they are going to advertise in the particular region served. I am not saying it would be absolutely impossible to set up some sort of centralized device, but it would not be easy. It would be quite difficult. In other words, what I am saying is it is not impossible but it would be very difficult to try to market this thing nationally in the same way that the national TV account is.

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[1767] Cross Examination By Mr. Topkis:

Q. Doctor, you compared the salary advances of ballplayers with those in the manufacturing trade, industries,

lawyers, computer scientists and so on. Did you compare the experience of ballplayers with the experience of basketball players? A. I did not have any basketball data.

Q. Did you ask for it? A. No.

Q. Did you compare their experience with the experience of hockey players? A. No.

Q Did you ask for it? [1768] A. No.

Q. It has been suggested, I believe, in the press that the median figure of basketball players in the National Basketball League or at least in the New York entry there is over $50,000 a year. Have you ever heard that report? A. No.

Q. Did you compare the experience of baseball players, with that of motion picture stars? A. No.

Q. Did you compare the experience of baseball playrs, major league baseball players, with the experience of any other group which was at the top of its profession? A. No, there is no statistical breakdown that I know of of that sort of information.

Q. And you didn't ask for any information about motion picture stars or anything like that? A. I really wouldn't know who to ask.

Q. You did talk with counsel from time to time? A. Yes.

Q. You didn't ask them? A. No.

Q. Did it occur to you, Doctor, that you were making essentially meaningless comparisons when you [1769] compared major league baseball players with accountants and teachers and computer scientists? A. No.

Q. You thought it perfectly valid comparison to compare people at the pinnacle of their profession, namely, baseball, major league, baseball players with the average run of wage earners in the manufacturing industries and with the average run of attorneys and accountants and computer scientists? A. I though that a number of the occupations used were reasonably alternative occupations if a person had not gone into ball playing.

[1770] Q. And you didn't compare either, did you, Doctor, the experience of baseball players, not major league

baseball players, but baseball players with the expereince of people in these other industries? A. No.

Q. And what proportion of players in organized baseball do major league players account for, do you know that, Doctor? A. Not precisely, no.

Q. Do you have any idea? A. Oh, I would expect not over a third.

Q. And it could be a good deal under a third, couldn't it? A. Yes, I was thinking of the 40 players control, but I am not sure of what the percentage would be.

Q. Doctor, did it occur to you that there was anything unusual or unreasonable even about comparing the wage trends of major league baseball players with that of other industries when major league baseball players have remarkably short careers as compared with the other industries? A. No. Would you repeat the question? I am sorry.

The Court: Would you mind, Mr. Court Reporter?

(Question read.)

A. No.

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[1775] Q. Doctor, let me ask you this: Wouldn't the fairer and more meaningful comparison have been to compare the average salaries in 1965 of players who then had four years of major league baseball experience with the average salaries in 1969 of players who then had four years of major league baseball experience? Wouldn't that have given you a fairer and more meaningful comparison? A. That was not the analysis I was making. I was trying to follow a player, a group of players who had gone through the negotiating processes over a four and five-year period, to see how well they had fared, so I think the [1776] comparison you mention is a fairly interesting one and I am quite it would show there has been some change in salaries over the period, but what it is, I don't know. I would point out that the average salary of all players on the roster is given in August 1965 as 19,500 and the comparable figure

for all players on the roster again in '69 was 24,957, which does indicate there has been some escalation in wages generally.

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[1801] Q. Doctor, assuming the average major league life of a player who comes up to the majors and lasts at least sixty days to be approximately 4-¾ years, would you tell me where in your table on Page 5 I will find his lifetime average earnings? A. It will be obtained by multiplying 5 times 8,818.

[1802] Q. So his average major league lifetime earnings would be $8,818? A. Times 5; $8,818 times 5.

Q. Times 5, about 44,090? A. Well—

The Court: What was Mr. Topkis' figure?

(Question read.)

A. That is correct.

Q. Doctor, is that right?

The Court: No, it's not right.

Mr. Topkis: I don't think so.

The Court: Well, you were wrong.

Mr. Topkis: No, I said, I believe, 44,090.

The Court: If you want to correct it we will try it another time.

Mr. Topkis: We never stop being trial lawyers.

Q. Is that the correct figure, Doctor, $44,090? A. $44,090.

Q. Thank you. Now, actually, Doctor, that figure isn't right, is it? A. Of the players that we checked who had—there were 29 players in that category who had a major league career of five years, and that is what it came out to, an average salary per year of 8,818 for five years.

[1803] Q. Doctor, in statistical terms is the way to get the average lifetime earnings of a major league ballplayer—and let's limit to one who had been up for 60 days at least—to look on your table and look at the five-year figure? A. Well, these were calculated by totalling up the actual salaries paid these different players, these 29 play-

ers, and dividing down to get to the 8,818, so you could build it back up the same way.

Q. Now, Doctor, would you try answering my question?

Mr. Topkis: May I have it repeated, please, your Honor.

The Court: Surely. Will you do so, Mr. Court Reporter.

(Question read.)

A. If the service is five years, yes. If it is less than five years it would be slightly lower.

Q. I am asking you to consider the entire class of major league baseball players who come up to the majors and last 60 days. A. The only figure this applies to is players specifically for five years.

Q. Right, so this figure that you are showing me on page 5 does not indicate a player's lifetime earnings at [1804] all, does it? A. Four or five-year service.

Q. Four or five-year service? A. Yes.

Q. But that is not my question. I am asking you about the average player's lifetime earnings, and I am suggesting to you that your table on page 5 does not have that information. Am I not correct? A. You are correct.

Q. Thank you.

Now, I ask you again, have you ever made an effort to calculate the average lifetime earnings of a major league ballplayer in baseball, and then I will ask you a further question? So that we understand each other, let me make my point clear, I will ask you a further question about his average lifetime major league earnings. Have you ever calculated either of those? That is the question. A. A major league player, yes, sir. The average major league player, no.

Q. You have calculated his average lifetime earnings in neither situation, neither his total earnings nor his earnings from playing major league ball? A. We calculated the average earnings for a large number of individual players, but not an average player.

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[1807] Q. And that means that of the players who were on 1965 rosters, 257 were still active in 1969, right? A. Yes, and had played each of the years.

Q. Right. Now, how many players were there on the 1965 rosters? A. 498.

Q. So that 241 of the 498 were no longer active in baseball four years later, is that right? A. They may have skipped a year, but essentially that is correct, yes. They were not on active rosters.

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[1814] Q. You have a chart somewhere in your report, haven't you, Doctor? A. Yes.

Q. And where is that, Doctor, would you tell us? A. On page 16.

Q. Right. In the last five years there has been an inconsequential change in player development in minor league operations costs according to that page, isn't that right? A. Yes, in the past five years, that is correct.

Q. And have you charted that cost for a longer period than those five years? A. No. I charted just the cost there and the team operations, salaries and pension funds for a comparable period.

Q. Yes, I see that. Now, Doctor, referring to this table on page 16, I see there an increase in selling, general and administrative expenses from 14.8 to 19.2 [1815] per cent. Do you see that? A. Yes.

Q. That is an increase, using the 14.8 as a base, of 29.6 per cent, isn't it? A. It would be just under 30 per cent, yes.

Q. So that selling, general and administrative expenses, or more accurately the proportion of club revenues which have gone to selling, general and administrative expenses has gone up a shade under 30 per cent in five years, right? A. That is correct.

Q. Now, will you agree with me also that the category marked "Other" which has increased from 6 per cent to 8.6 per cent has gone up, using the 6 per cent as a base, ap-

proximately 23 per cent? A. Approximately 43—from 6 to 8—let me look at the figures again to make sure. I don't know if I heard you correctly. From 6 up to 8.6.

Q. Yes, and that in percentage terms. A. Yes, those are percentages.

Q. But what is the percentage increase? A. That is what I am rechecking. I get 43 per cent.

Q. Very good, 43 per cent. I am sorry, my figure was off. So that other expenses have gone up 43 per cent in selling, general and administrative expenses have gone up [1816] 30 per cent.

Now, will you tell us, Doctor, what are the components of selling, general and administrative expenses? Are they predominantly salaries or are they predominantly something else? A. Salaries are—well, let's take general and administrative salaries.

Q. Salaries, that is what we are talking about under selling, general and administrative expenses. A. I don't have a breakdown on selling, general and administrative in detail, but I did get a breakout on general and administrative, and they average out to around $220,000 a club.

Q. Yes, but all my question is, Doctor, is this: The cost of selling, general and administrative expenses, that is almost exclusively a salary item, isn't it? A. It would be a heavy item, yes.

Q. Well, there is nothing else, is there? I mean when you are running a selling organization, an administrative organization— A. Well, you have a lot of stuff printed, ads and brochures, give-aways.

Q. Well, just roughly, you would agree with me that salaries account for— [1817] A. Is a major item, yes.

Q. —the vast preponderance, isn't that right, of such? A. This is a substantial part. I would have to look at the figures to know for sure.

Q. How about other expenses, Doctor? A. Well, other—go ahead.

Q. They are predominantly salaries, too, aren't they? A.

No, in that case there is a great deal of travel expense, uniform expense, equipment expense, meal money expense, travel back and forth when players are sent out and brought back, so there the expense is much less.

Q. You mean salary expense? A. The salary expense is very small there.

Q. So that the other category is made up of things which the club must buy in order to service its team, and salaries which it must pay? A. And the cost of traveling, getting the team there, which is a major item.

Q. Cost of traveling? A. Right.

Q. And the other expenses have gone up 43 per cent and the selling, general and administrative expense has gone up a shade under 30 per cent. Now, would you calculate for [1818] me, please, the percentage increase in team operation costs, meaning salaries of players and pension funds.

The Court: What page is that on?

The Witness: This is still on page 16.

The Court: Thank you, yes.

A. 11 per cent.

Q. 11 per cent, so that the player expenses, salaries and pension funds have gone up 11 per cent in those five years, other expenses have gone up 43 per cent, and selling, general and administrative expenses have gone up around 30 per cent, right? A. Yes.

Q. Doctor, would you say that those figures reveal a strong bargaining position on the part of players? A. I think they reveal—no, they do not.

Q. They reveal the contrary, do they not? A. They reveal a great deal of changes that have taken place over the period in traveling costs and other costs. In other words, they don't necessarily go up at the same rate.

Q. Well, let's focus on the selling, general and administrative expenses. We agreed a moment ago, I think, that that is predominantly a salary item. A. Yes.

Q. So that the office workers have done three times [1819] as well or almost three times as well as the players in their salary negotiations in terms of winning increases, is that

correct? A. I would have to look at the detailed figures which I have never had broken down.

Q. Have you asked for them? A. No.

Q. On the figures we have, my statement is correct, isn't it? A. Yes.

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[1836] Q. Doctor, going to your report, at Page 1 you report that between 1965 and 1969 the average salary of ballplayers on the rosters at the end of August increased by 27.9 per cent, right? A. Between August, 1965, and August, 1969, yes.

Q. Have you compared that increase, Doctor, with the increase in the consumer price index? A. No.

Q. It is suggested to me that the consumer price index in 1965 stood at 110, the base being 100 in 1958, and in 1969 it stood at 125.

Does that accord with your recollection? A. I don't know.

Q. Do you have that data with you? A. No.

Q. You computed the average salary in both August, '65, and August, 1969. Did you by any chance compute the median salary? A. Yes.

Q. What was that? A. 17,000 in 1965 and 20,000 in 1969.

Q. 17,000 even? [1837]A. Yes.

Q. And 20,000? A. Yes.

Q. And could you, just so that the record may be absolutely plain, explain to us what the median means? A. Yes. The median is the middle person in the array. You just count down to that person and find out what his salary is.

Q. Could you calculate for us in percentage terms the increase in median income between 1965 and 1969? A. Yes.

(Witness makes computation.)

A. It is nearly 18 per cent.

Q. Could you carry it to the decimal, please, so we can have the exact comparison?

(Witness makes computation.)

A. 17.7 per cent.

Q. 17.7 per cent. That was the increase in median income between '65 and '69? A. Yes.

[1854] Q. All right, Doctor, you have testified, I believe, that the reserve clause, in your judgment, operates to produce a tendency toward equalization of competition on the playing field, is that right? [1855] A. It attempts to, yes.

Q. It attempts to. In your judgment has it been successful? A. I would say during the long stretch in the late '40s and '50s in which the New York Yankees dominated the American League, that it was not operating successfully. In the last five years there have been four different clubs, '65, '66, '67, '68 and '69, four different clubs in the American League have won pennants. In the National League three different clubs. This is an improvement, but as to whether it is completely successful I think is yet to be determined.

Mr. Topkis: Well, excuse me just a second, your Honor. May I confer?

The Court: Yes, sir.

(Pause.)

Q. Doctor, you say that in the last five years the reserve system has operated reasonably well, is that right? A. There has been an improvement in the situation, the previous situation in which there was such a dominance in the American League by one club.

Q. Well, actually, Doctor, in the years '65 to '69, how many clubs were there in organized baseball, major league clubs? [1856] A. Major league clubs, for the first four years, there were ten in each league and for the year '69 there were 12 in either league.

Q. So that for the first four years there were 20 major league clubs and in 1969 there were 24 major league clubs, right? A. Yes.

Q. Now, Doctor, according to my understanding of the facts, three clubs won 60 per cent of the pennants in those five years, isn't that right? A. Yes.

Q. Doctor, if you regard that as a time when the reserve clause, or system was operating reasonably well, what would be your notion of a time when it was operating poorly? A. I said it was operating better. Poorly would be during the long stretch of the '40s and '50s when the Yankees were dominant.

Q. Would you regard 50 years as an appropriate length of time in which to measure the success or failure of a system, Doctor? A. I have no particular opinion on that.

Q. You have no particular opinion? A. It could be 20 years. It depends. What I think is happening in the change in the experience in more recent [1857] years, is there have been some changes in the player selection, in the draft, which attempts to give advantages to the weaker teams. This combined with the other restrictions of the reserve clause are directed towards improving the competitive nature of the game. Whether these are beginning to have an effect, there is some hope that they are by the fact that in the American League Baltimore has won twice, Detroit once, Minnesota once, then Boston once in the last five years and—

Q. Dr. Clark—excuse me. A. I was just going to give the National League; two for Los Angeles, two for the Cardinals and one for the Mets.

Q. Well, you would agree, would you not, that the reserve system has not produced any reasonable spread of competitive ability in the last five years? A. I would say the last five years is more reasonable than earlier.

[1858] Q. The last five years, we saw just a moment ago, three teams won 60 per cent of the pennants, right? A. Yes.

Q. And I am told that in the last 50 years four teams won 63 pennants, that is, 63 per cent of the pennants. So there is no significant difference, is there? A. The other teams—what I would hope in a longer period of time is as it goes along the dispersion that we have had in the American League the last few years will continue, that there will be a change from one to the other.

Q. But as a matter of history, the reserve system has not operated to produce any reasonable level of competition on the field, isn't that right? A. Not a satisfactory level.

* * * * * * * * * * *

[1864] Q. And to refresh all our recollections, Dr. Clark, what does your study reveal about the rapidity with which player salaries increase as they stay on the major league roster from year to year? A. After the first two or three years, if they really prove themselves the salaries go up rather quickly.

Q. Could you perhaps refer us to the portion of your study that contains that information, again just to refresh our recollection? A. On Page 5, where we take the average salary experience of players who have different length careers. If you have one of the players, for example, who actually lasts beyond the five-year period, there is a very sharp increase in the average salary level from that point on.

Q. And the study that is explained at the bottom of Page 1 of your report is also relevant there, is it not? A. Yes. This referred to the experience of players who were on the roster for a four-year period and a five-year period and the fact that there was a very substantial increase in their salaries during that period.

Q. What was the order of magnitude of that increase? A. Over the four-year period it was 94.1 per cent, and over the five-year period 129.4 per cent.

* * * * * * * * * * *

[1865] Q. Mr. Topkis asked you several questions before the recess which were designed to indicate that the reserve clause has not succeeded in establishing an ideal level of equality in competition. Reference is constantly made to the Yankee years and to the fact that in the last five years two clubs have each won two pennants which indicates—three clubs have won two pennants, indicating three clubs

[1866] have won 60 per cent of the pennants in those five years.

Let me ask you, Dr. Clark, what you think the record of organized baseball would be or major league baseball would be over the last few years and, indeed, over the history had there been no reserve clause at all? A. I think it would have been more unequal than it was. I think we have established the fact that Los Angeles and New York are particularly attractive areas, and clubs in those areas, those two cities, had a distinct advantage in attracting players and unquestionably would have attracted the best players.

Q. Is it probable that that difference would be an extreme difference? A. Yes.

Q. And is it possible that it would be a difference great enough to distort or destroy league play as we now find it? A. I think it is entirely possible.

. . . . . .

Marvin J. Miller

[1883] Direct Examination by Mr. Topkis

Q. Mr. Miller, based on your experience, would you say that there has been collective bargaining in baseball as to the continuation of the reserve system? A. None at all.

Q. When the first basic agreement was signed, that was when, sir? A. That was in February 1968.

Q. Would you tell us, please, whether in signing that agreement you accepted the reserve system as it then stood? A. No, your Honor, we did not.

[1884] The Court: Next question.

Q. You, however, did sign the agreement on behalf of the Players Association? A. We signed a basic agreement in February of 1968.

Q. Did you make any statements in connection with signing that basic agreement re the reserve system?

Mr. Hughes: Now, are these statements to whom, and can we fix the time and place?

The Court: Yes.

Mr. Topkis: Gladly.

The Court: Otherwise I would have to sustain an objection.

Q. Did you make any statements to the representatives of baseball management to that effect, and if so, please tell the Court when and to whom you made such statements?

A. Yes. Your Honor, there were two types of statements, one oral and one written. If I may take the written statement first, it appears in the basic agreement. It was an agreement to conduct a joint study on possible alternatives to the reserve clause as then constituted. It provided that the study was to be undertaken during the two-year life of that basic agreement, to be completed by its termination. The termination of the agreement as then written was December 31, 1969.

[1885] The oral statement was made at either the final or next to the final negotiating session in trying to wrap up the agreement as a whole, and it was to the effect that we did not accept the reserve system as legal and that therefore we wanted the Player Relations Committee to know that when we agreed on a clause, for example, which is a normal clause, that we will do our best efforts to carry out the provisions of the agreement, that they should know that the reserve clause we considered illegal and therefore we could, of course, not agree to use our best efforts to carry that out.

Q. Now, the first basic agreement, Mr. Miller, Exhibit F in evidence, provides, as you stated, that there should be a joint review of the reserve clause. The agreement was signed in February of 1968, you say?

Mr. Kramer: Obection. I move that the words "as you stated" be stricken because that is not what the witness said. He called it a joint study.

Mr. Topkis: Excuse me if I misspoke. I aplogize.

The Court: Yes, but Mr. Kramer is right.

Mr. Topkis: I apologize, your Honor.

The Court: Will you reframe it, please, Mr. Topkis?

Mr. Topkis: Surely, your Honor.

Q. The first basic agreement was signed in February of [1886] 1968, is that right? A. I am trying to think of the date of signature. It is dated February 1968.

Q. All right, that is satisfactory. Now the agreement calls, as Mr. Kramer tells me, for a joint study—

Mr. Kramer: No, it calls for a joint review.

Q. It calls for a joint review—that is what I thought—of the reserve clause, right? A. Yes, sir.

Q. Now, did you have some meetings with the representatives of major league baseball in conjunction with that study or with reference to th-t study? A. Yes.

Q. When did the first of those meetings take place? A. In April of 1969.

Q. 14 months later? A. Yes.

Q. Were there a number of such meetings? A. I believe there were a total of four meetings, the first of which was to attempt to lay the ground rules for the committee review.

Q. At anytime in the course of those meetings did the representatives of management ever come forward with any proposal for modification of the reserve system in the [1887] slightest degree? A. No.

Q. Were there various proposals submitted by you? A. Yes.

The Court: Various proposals of what kind?

Q. With reference to possible modification of the reserve system submitted by you? A. Yes, your Honor.

Q. Did there come a time when the joint study or review ended? A. Yes.

Q. When was that? A. I believe it was in the late summer of 1969.

Q. Had agreement been reached on anything in the course of this review? A. Nothing that I can recall.

Q. And that was the end of the review? A. Yes.

Q. Did any report emerge from this review? A. If I may, your Honor, I had suggested the possibility of a joint re-

port. The management representatives did not think that was a good idea in view of our lack of accomplishment. I did issue a report on behalf of the Players Association.

[1886] Q. But no joint report emerged? A. That is correct.

Q. Some months later, I think in late December of 1969 the news became public of a possible lawsuit by the plaintiff here, Mr. Curt Flood. A. Yes.

Q. And at that time were there any discussions going on between you and representatives of baseball's management with reference to the reserve system? A. Yes.

Q. In what context were those discussions being carried on? A. In the context of our joint attempts to negotiate a new basic agreement to replace that first one.

Q. The first one being scheduled to expire December 31, '69? A. Under its terms. However, it, in fact, did not expire until later because a notice had not been issued by us.

Q. So that there were discussions going on into the new basic agreement, is that correct? A. Yes.

Q. And in those discussions, one of the subjects that you had under consideration was the reserve system? A. Yes.

[1889] Q. Did you make proposals as to possible modification of the reserve system in those discussions? A. Yes.

Q. Were any of them in the slightest degree accepted by representatives of management? A. No.

Q. Did representatives of management come forward with any proposal whatsoever for modification of the reserve system in the slightest degree? A. No.

Q. When the news of Mr. Flood's impending suit became available, did that news have any impact upon the discussions which you were having? A. No.

Q. You were in court when Commissioner Kuhn and Mr. Gaherin testified? A. I was.

Q. Did you hear them testify that, in effect, the news of Mr. Flood's suit brought discussion of the reserve system to a crashing halt? A. I heard it.

Mr. Hughes: I object to that.

The Court: Yes, crashing halt.

Mr. Topkis: Excuse me.

[1890] The Court: Strike out "crashing" brought to a halt.

Q. Brought to a halt? A. I heard it.

Q. Does that testimony conform with your recollection? A. No, it does not, your Honor. There was no difference whatsoever in the nature of the discussions before it was known that Curt Flood intended to file a suit and after it was made known that Curt Flood intended to file a suit. As a matter of fact, there was not even any conversation between the parties concerning the news about the suit.

Q. Did discussions about the reserve clause—

Mr. Hughes: Excuse me just a moment. For my benefit, are you now talking about conversations prior to the actual commencement of the action? Is that where we are?

The Witness: Yes.

Q. So there came a time when the action was commenced and that was in mid-January, right? A. Yes.

Q. Did discussions go on between you and managemnt relating to the reserve system after that date? A. Yes, indeed.

Q. For how long a period? A. Until the second part of February, somewhere about February 19th.

[1891] Q. And what happened then? A. At that point, with time running out in terms of the expiration of the basic agreement, the Players Association suggested that while it would be most desirable if we could work out appropriate amendments and appropriate revisions in the reserve rule system, that if we were unable to do that, for whatever reason, we suggested that the matter be put aside, outside of the basic agreement itself, but that proposal and discussion by us did not take place until on or about February 19th.

Q. And was that the end of discussions of the reserve system, in substantive terms? A. Substantive terms?

Q. I will make my question clearer. Did your discussions then of possible modification of the reserve system end and

did you then go to discussion of a formula by which you would agree to lay the subject aside? A. Yes, but I recall there were several conversations at negotiating meetings in which we pointed out that if we were able to agree upon appropriate revisions that the plaintiff had made a commitment to the Players Association and had made it publicly, as a matter of fact, that he would withdraw his suit. This was said in response to the owners' representatives saying that there was no possibility of [1892] talking about the issue since a suit had been filed.

Q. When you say the owners' representative, whom do you mean? A. I used the plural. I mean the members of the Player Relations Committee with whom we meet in negotiations.

Q. You said you were here when Mr. Gaherin testified? A. Yes.

Q. Did you hear him say, in substance, that at a meeting you said that if amendments to the reserve system were included in the new agreement irreparable damage would be done to this action, the action brought by Curt Flood? A. I heard him say that.

Q. Was he accurately reporting your statement? A. It was completely inaccurate. It was quite the reverse.

Q. What did you in point of fact say to him? A. I said to him that if we could agree on appropriate amendments there would be no Curt Flood suit because Curt Flood had said whatever amendments were acceptable to the players as a group he would accept and withdraw his suit.

Q. Following that conversation or that meeting, were you able to arrive at any amendments to the reserve system? A. No.

Q. At any time during the entire history of your deal- [1893] ings with the representatives of organized baseball, Mr. Miller, have those representatives proposed the slightest modification of the reserve system? A. At no time.

Q. There was testimony, I believe, the other day as to a suggestion made that the reserve system's hold on a man

end when he reached the age of sixty-five. Do you remember that? A. Yes.

Q. Was such a suggestion made at a meeting between representatives of the Players Association and representatives of the club? A. Yes.

Q. Approximately when? A. Some time in January of 1970, I believe.

Q. Who made that suggestion? A. Jim Bouton of the Houston Astros.

Q. Jim Bouton of— A. The Houston Astros.

Q. He is a pitcher, a player? A. Yes.

Q. Is he the player representative of the Houston team? A. No. He was in New York and it has been our practice—

The Court: You see, that doesn't help us.

[1893a] A. He is not a player in New York.

Q. But he was attending the meeting? A. Yes.

[1894] Q. And he made this proposal? A. Yes.

Q. In terms of the flow of that meeting, that is to say, from its beginning to its end, do you recall at what point Mr. Bouton made that suggestion? A. Yes. We had been meeting and discussing a number of subjects, including the reserve rule system. Approximately somewhere around the middle of the meeting.

Q. And what was the response that was made and by whom? A. As I recall, the first response was made by Mr. Carroll, attorney for the National League, and he said that that idea could not be entertained because it would mean that we, meaning the Players Association, would thereby get our foot in the door.

Q. Did anyone else on behalf of management make a response to this suggestion? A. Yes. Mr. Gaherin did.

Q. What did he say? A. He enlarged on what Mr. Carroll said. He said that if such an amendment were made it would simply be used by the players at a later date to get more, and that would disturb the entire system, which he felt served well.

Q. Was that the end of the discussion of the [1895] Bouton proposal? A. I believe so.

Q. This conversation then turned to other subjects? A. I don't recall.

Q. But it turned to some other subjects and you don't recall which ones, is that right? A. We may have continued to talk—

The Court: Not you may. Listen to counsel's question. Would you repeat it, Mr. Court Reporter.

(Question read.)

A. Not necessarily.

Q. At any rate, Mr. Miller, discussion of the freedom at age 65 proposal stopped? A. That is correct.

Q. And did discussion then go to either the reserve system generally or other subjects which you had up for discussion? A. One or the other.

Q. And did the discussion then go on for some time? A. Yes.

Q. When Mr. Bouton made his suggestion, was he smiling, laughing or in any other way other than serious? A. He was quite serious.

[1896] Q. And Mr. Carroll, when he responded, was he laughing? A. Not that I recall.

Q. Mr. Gaherin, when he responded, was he laughing, smiling? A. No.

Q. Was any clarification sought by either Mr. Carroll or Mr. Gaherin as to the suggestion? A. The only clarification occurred when Mr. Bouton suggested Social Security age. Mr. Carroll asked him, "What age do you mean?"

Mr. Bouton responded, "Age 65."

Q. In the course of your negotiations with the representatives of organized baseball, Mr. Miller, have you taken the position that continuation of the reserve system in its present form is an appropriate subject for collective bargaining like any other controversy between an employer and an employee group? A. Not quite.

Q. Why not? A. Well, your Honor, it has been the position of the players and the Players Association that

the reserve rule system is illegal and by virtue of that feeling we do not feel that it is in the same category as any other bargainable [1897] subject, that is, it is our feeling that—if I may use a parallel to explain—if an employer refuses to pay as much as the statutory minimum wage, we might attempt to bargain with him in order to get him to comply with the law, but the fact that he refuses and insists on violating the law puts that issue in a completely different category, in our view. It does so because it is quite clear in our minds, at least, that no individual and no organization can bargain away somebody's legal rights, a member's legal rights.

If in fact the reserve rule system is illegal and if in fact the plaintiff is being damaged by such illegal restriction, the Players Association can not possibly accept in a package, as has been implied, the continued existence of such illegal restrictions no matter what else is given in the way of concession.

Q. And you have expressed that view to representatives of the clubs? A. I have expressed the view that it is illegal. I don't think that we have gone into any detail about the underlying feeling that we have.

Mr. Hughes: Then I move to strike the answer, your Honor, the preceding answer. If this was some attitude of Mr. Miller and the players uncommunicated to the defend-
[1898] ants, I submit it is inadmissible, and I move to strike it out.

The Court: Mr. Topkis?

Mr. Topkis: Could I ask a couple of other questions on voir dire, your Honor?

The Court: Yes.

Q. Mr. Miller, have you expressed the ultimate position that the reserve system is illegal to the owners? A. Yes.

Q. And have you explained to them why you felt it to be illegal? A. Yes.

Q. And have you explained to them what you felt your responsibilities to your constituency, the players, were? A.

Yes. If I may explain, perhaps I can clarify this, your Honor.

In connection with drawing up the new basic agreement, we explained, for example, to Mr. Gaherin and to his associates that the primary reason why we could not have an agreement which incorporated the existing reserve rule system was that under advice of counsel, in view of all the circumstances, we would be liable to be a defendant in a subsequent suit against the reserve rule system.

Q. Now, Mr. Miller, there has been testimony here—

[1899] Mr. Hughes: I still press the objection.

The Court: I will let the testimony stand, Mr. Hughes.

Mr. Topkis: I will go to something else, your Honor.

The Court: Before you do, may I ask a question or two? This troubles me somewhat.

Bearing in mind your activities that you have here recited, Mr. Miller, assume for the sake of argument that in such negotiations one side takes a positive position and the other side says, "No, we don't recognize it, it's illegal," do you mean to say that in the give and take of negotiations those seemingly irreconcilable positions can't be blunted and the substitute adopted which will make both sides happy? I thought that is one of the biggest things that peacemakers effect, and you are telling me no, you stop. You say, "If that is the way you look at it, we can't pick up any negotiations with you."

Isn't that what you are saying to me? That is what puzzles me.

The Witness: Not quite, your Honor.

The Court: You straighten me out.

The Witness: We have never said and never will say that continued discussions should not go on in an [1900] attempt to resolve an obvious problem.

The Court: Even with regard to the reserve system clause that you label as illegal?

The Witness: Yes, sir. However, it is the position of the management in signing a new basic agreement for three

years that they would like to be relieved of the obligation to discuss this. As a matter of fact, their first proposal to us, which they held to for weeks, was that regardless of what happened in this case they wanted to be relieved of discussion for the full three years of the basic agreement and have us admit in the agreement that they had no obligation to even discuss it with us. This was not our position.

The Court: I think I understand. All right.

By Mr. Topkis:

Q. Do I understand, Mr. Miller, that your basic problem with the reserve system as you communicated that problem to the management, is that it has been a system of total or absolute restraint? A. Yes.

Q. And you were perfectly willing to attempt to negotiate a system of significantly lesser restraints which you said would possibly make the entire system lawful, is that right?

[1901] Mr. Hughes: Your Honor, I submit that that is leading and suggestive.

The Court: Objection sustained.

Q. Did you tell the owners that you would be willing to negotiate with them with reference to the reserve system? A. Yes, and we made it clear at all times that we didn't think we had a premium on all the brains, and we urged that they make still other suggestions for our consideration, which they never did.

The Court: I am not pressing my points any further. You know, I stayed away from interrupting throughout this entire trial, and I am not going to start in now, but I do hope all of this will be thoroughly gone into by all the attorneys. I would like this meticulously developed. I don't want to be in a position where I say to counsel later that old story about, "Do you mind if I ask some questions?" and the lawyer says, "Certainly, your Honor, so long as you don't lose my case."

I am going to count on you to develop this bit by bit, be-

cause I place a great deal of concern on this phase of the trial.

Mr. Topkis: Your Honor will perhaps forgive me, then, if I seem to go over ground that has previously been covered because I do want to bring out the whole story.

[1902] The Court: Sum it up if you go over previous ground.

Q. Did you say anything, Mr. Miller, in your conversations with representatives of management about how you would view the legality of a reserve system which was modified in accordance with your suggestions which might come from them?

Mr. Kramer: If your Honor will permit, I think it would be more help and more important to your Honor if Mr. Topkis could specify a time period, unless he means any time between '66 and the present.

The Court: All right, let me suggest this. You know what I am after. You are capable of delivering it. I know of nobody at the bar who can give it to a Judge better than you gentlemen.

Short recess. Devise among yourselves how you are going to tackle it.

Mr. Topkis: Very well, your Honor.

The Clerk: Short recess. All rise.

(Recess.)

[1903] By Mr. Topkis:

Q. Mr. Miller, I believe before the recess I was asking you about your conversations with representatives of the major leagues in connection with the reserve system and Mr. Kramer asked, I believe, that we fix a date for these conversations, so let me begin now by putting this question to you.

Did there come a time in your discussions with representatives of organized baseball, either as part of the joint study or as part of your negotiations for a new basic agreement, in which or at which you discussed the legality

of the reserve system and the possible effect on its legal status of modification? A. Yes.

Q. When was that time, sir? A. I think there were several times. There were negotiations in late 1967 and early 1968 leading to the first basic agreement. There were discussions during the joint review period and there were discussions in late '69 and early 1970 during the negotiations of the new basic agreement. I cannot pinpoint dates for you, but there were numerous discussions.

Q. Now, in these numerous discussions did you express substantially the same position as to the legality of the [1904] reserve system and the effect on that legality of modification or rid your position change? A. It did not change with respect to the legality question and with respect to our proposals, they were to modify and not to abolish.

Q. And would you sum up for the Court what the position was that you expressed at these various meetings? A. Basically the position was that it was our position that the reserve rule system was illegal in that its restrictions were just about total, that it was inconceivable to us that you could have a game of baseball with no rules, but that it seemed quite reasonable to us that modifications which were less restrictive than the present system could be made, were practical, and presumably could make the system safe from an attack in terms of its illegality.

Q. You mean would make the system lawful? A. Yes, sir.

Mr. Hughes: Well, your Honor, I move to strike the answer.

The Court: Motion granted. It is stricken and disregarded.

Q. Was anything said by you, Mr. Miller, as to the feasibility of your accepting the reserve system in its present form as part of an overall package containing other [1905] elements which perhaps would be more beneficial to players? A. Yes.

Q. Would you tell the Court what you said? A. We said

that in view of our belief we could not agree to accept the present system in an agreement and that, in fact, accepting it in a basic agreement would not make it legal either.

Q. Did you say anything about your view as to the possible impact on the Players Association of your accepting a new basic agreement which approved the present reserve system? A. Yes. As I testified before, I did say that we had been advised by counsel that under all the circumstances to accept that system in an agreement would render us liable in terms of being a defendant in any future action against the reserve rule system.

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[1911] Q. Very well. Mr. Miller, have you had occasion to compute the average major league life of a ballplayer? A. Not personally.

Q. Have such computations been made under your supervision and pursuant to your direction? A. Direction, but not supervision.

Q. Have they been reported to you? A. Yes.

Q. And have they been used by you in your negotiations and discussions with the management? A. Yes.

Q. And has exception ever been taken to the results [1912] of this study? A. No.

Q. And what were the results as so found by people working under your direction and reported by you to the major league club owners?

The Witness: May I enlarge on this, your Honor?

The Court: Within limits.

The Witness: Because I think it might help to clarify one thing that has been said and never explained.

A. The figure of 4¾ years as the average major league life of a player of those who stay 60 or more days has this origin: The major league baseball player's benefit plan, pension, insurance and health care plan, provides that you are not a member until you have 60 days of service, and that is why that break-off point. In the negotiations under the benefit plan, the actuary of the pension committee—and

the pension committee is a joint body and the actuary is employed jointly—was asked what was the average credited major league service of those members of the plan, those who became members of the plan who have 60 or more days, and the four and three-quarter years—rounded to the nearest quarter year—is the figure provided by the actuary at some point in our negotiations under the benefit plan.

Q. Mr. Miller, in the course of our discussions with [1913] club owners about possible modification of the reserve system, has the claim ever been put forward by any representatives of the owners that they were unable to pay the cost of any modification of the reserve system? A. Quite the reverse.

Q. A simple answer to my question is no? A. Sorry. No.

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[1925] Q. Mr. Miller, have you ever made any public statements—let me rephrase that—statements for publication, and which you knew were for publication, in which you characterized or gave your opinion with regard to the football one-year option system? A. I think I must have.

Q. Do you recall, sir, an interview, a telephone interview, which you gave to a Mr. Sandy Grady, a sports columnist for the Philadelphia Evening Bulletin, on or about January 6, 1970? A. I think I do.

[1926] Q. Did you discuss with Mr. Grady the subject of the football one-year option provision? A. I believe so.

Q. Do you recall what you said to him about it? A. I gave him my honest opinion at the time, which, as best I recall, was that the football system had weaknesses in that the original playing-out-the-option idea did not carry with it the additional rule that the Commissioner of Football could determine the compensation to be rewarded to the team losing the player by the team gaining the player, and that in my opinion the addition of that rule under which the Commissioner, whom I considered and still do consider to be an employee of the owners, could have the final deter-

mination which was binding and unappealable was not a good system.

Q. And did you say in words or substance to Mr. Grady on that occasion that:

"Football has a bastard thing, because four or five years ago they gave the Commissioner authority to rule on trades involving those free agents and in practice a football player isn't that free. It's semi-fraudulent"? A. Yes.

Q. And you made that same statement and characterized the football one-year option with those very words [1927] on other occasions, have you not? A. I am quite sure.

Q. And is it not also true that in other interviews, Mr. Miller, you have made statements to the following effect, in words or substance: "Football changed its internal rules and made the Commissioner of Football sole judge about what compensation the club who is losing the player should get from the club that is gaining the player, and it is provided that the Commissioner's decision in that case shall be final and unappealable. It seems that any time the Commissioner wants to put a stop to that he can and, in fact, does."

Have you given interviews to that effect, Mr. Miller? A. Yes.

Q. Have you in any bargaining session with the representatives of the major league clubs ever told those representatives what changes in the reserve system would be sufficient in your judgment to protect the Players Association from antitrust suits at the hands of third parties? A. We have proposed—.

Q. Can you answer that question yes or no, Mr. Miller? [1928] The Court: He is entitled to a yes or no, if you can.

The Witness: I am not sure I can.

The Court: Would you like to hear the question?

The Witness: Yes, please.

The Court: Would you read it, Mr. Court Reporter.

(Question read.)

A. Yes, on several occasions.

Q. I want you to be sure you understand my question, Mr. Miller. You stated in your rebuttal testimony that at some juncture in the course of recent negotiations you stated to the representatives of the clubs that your advice from your counsel—and by that I take it you mean Justice Goldberg, do you? A. Not alone.

Q. Was to the effect that to sign an agreement incorporating the various features of the present reserve system would expose you to a possibility of suit, correct? A. Yes.

Q. My question is this and it is a very precise question. Did you ever in any bargaining session say to the representatives of management what the minimum changes would be which would remove that objection? [1929] A. I want to be perfectly sure I know what your question is. Subsequent to the statement?

Q. Yes. A. No.

Q. One additional question, please, Mr. Miller.

You gave the reporter at the beginning of your rebuttal testimony a detailed description of your prior experience which was interesting.

Is it not a fair assumption that you have never been engaged in industrial relations in any capacity on the side of management? A. Your Honor, I can not answer it with a yes or no. It would be misleading.

Q. Let me withdraw the question and rephrase it, Mr. Miller.

Is it not a fact that the vast majority of your experience has been on the side of labor? A. Yes.

Q. And is it not a fact, Mr. Miller, that you hold yourself out, and candidly so, as biased in favor of labor? A. Definitely.

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[1930] Cross-examination by Mr. Kramer:

Q. Mr. Miller, you testified, as I understood you, that the football option system as it presently exists is semi-

fraudulent but that, among other things, you would be willing to accept it in the negotiations with management, is that correct? A. Not quite.

Q. Correct me. A. The football system as it has operated and been operated by the owners and the Commissioner, I consider in that category, not necessarily the provisions themselves.

Q. I see. But you were not willing to accept the reserve system because it is illegal, in your opinon, correct? A. I am sorry?

The Court: Will you repeat it, Mr. Court Reporter.

(Question read.)

A. Yes.

Q. You remember in your direct testimony you compared the illegality of the reserve system as you saw it to the illegality of paying less than the minimum wage prescribed by law? A. Yes.

[1931] Q. Does that bit of testimony illustrate the degree of certainty in which you hold your opinion as to the illegality of the reserve system? A. Yes, but, as you know, I am not an attorney.

Q. Right. And you know that the attorneys and the Judge in this case have been struggling with this issue for months, do you not? A. Yes.

Q. Do you believe that a labor negotiator with 25 years of experience should be this certain about any legal question in his negotiation if he hopes to be successful? A. Yes, when he is so advised by counsel,

Q. Very well. Now, I understood your testimony to be that something that my client said, Mr. Kuhn, was either wrong or that you disagreed with it or both.

Do you recall the short phrase of testimony that related to Mr. Kuhn that you gave on direct examination? A. No, I don't.

Q. Well, I think what you said, and I didn't make notes and I should have, I think what you said was that you dis-

agreed with what Mr. Kuhn and Mr. Gaharin had said, and so I looked at the transcript to find out what Mr. Kuhn could have said that related to collective bargaining, and I found the only place, I believe. When we are through [1932] I am going to ask you if you had some other place in mind but I think you had this place in mind. It starts on Page 756, Line 16.

My question:

"Q. In your opinion, if changes are to be made in the reserve system, how should those changes be made? "A. They should be made by clearly, in my opinion, bargaining between the players and the clubs."

He goes on, but I am stopping at every sentence.

You don't disagree with that, do you? A. I disagree in part.

Q. Continuing the quote:

"I do not believe they should be made or that they can be made unilaterally by the clubs."

Do you agree or disagree with that? A. I agree.

Q. "We are dealing here with items and conditions of the players' employment."

Do you agree or disagree with that? A. I agree.

Q. "So the change should be made in bargaining.

"I feel that the reference to court litigation points up a misfortune in the present bargaining context.

[1933] "It has been my stated opinion repeatedly that the decision of the Players Association to back Mr. Flood's litigation here was a serious mistake on their part."

Now, you disagree with that, don't you? A. I certainly do.

Q. "This decision was made as long ago as their San Juan meeting in the first half of December, 1969."

Is that statement one with which you agree or disagree? A. I agree.

Q. "And to think that they were seriously embarking on realistic negotiations to find a solution when they had committed themselves to litigation is nonsense, in my judgment."

Changing the word "nonsense" to "unwise," would you agree or disagree with that? A. I would disagree because it is based on a false premise.

Q. "And, indeed, when they effectuated their determination at San Juan by bringing this litigation in the middle of January, it quickly resulted in the Players Association and the clubs bargaining team working out an arrangement whereby they simply put the reserve system [1934] question up on the shelf and thereafter ceased, so far as I can determine, to bargain on the subject." A. That statement is completely inaccurate.

Q. Right. Now I want you to go over it—do you want to go over it without hearing it again? A. Either way.

Q. You tell us about the "complete inaccuracy" of that statement. A. That statement says that in January immediately upon returning from San Juan the Players Association, in conjunction with the owners' representatives, because of the litigation, put the reserve rule issue in some different category outside the bargaining. That is completely untrue. The discussions, such as they were and such as had been going on intermittently for several years, continued right through January, right through February until February 19. That is why it is a completely inaccurate statement.

Q. So that there were discussions starting in '67 about the reserve system? A. Certainly there were discussions.

Cross Examination by Mr. Hadden:

Q. Then you must have a distinction in your mind between discussions and collective bargaining? A. I certainly do.

[1935] Q. Now supposing you tell us what that distinction is. A. The discussions that took place consisted of the Players Association putting forth ideas, making suggestions for study, and the owners' representative advising us, in substance, they like what they have, period.

The difference between that kind of a discussion and collective bargaining is that collective bargaining is a

give-and-take proposition in which you give serious consideration to the other side's suggestions, point of view, are prepared to examine in the greatest detail exactly what it is that is being proposed, and attempt, if possible, to put forward modifications, suggestions of your own, rather than what really amounted to a brick wall in which we were simply getting back, "We like what we have."

We understood that. That is not collective bargaining.

Q. Your position is that all that ever happened regarding the reserve system in negotiations with the players was that management representatives said, "We like what we have and that's it"? A. In substance. Other words were used.

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Bill Veeck

[1965] Direct Examination by Mr. Topkis:

Q. Now, on the basis of your experience, Mr. Veeck, do you have an opinion as to whether elimination of the reserve system would help or hurt baseball? A. Well, the complete elimination of the reserve system or the reserve clause in contracts I think would not be helpful to baseball. I am afraid that if you suddenly terminated and there was no control of contracts by any club, that it could—and I say only could—result in some rather chaotic conditions. I feel, however, that this would not be the case if it were done in an orderly manner.

Your Honor, I might say I recall when the government was involved in a case with the duPonts regarding the divestiture of—getting rid of their General Motors stock, and instead of dislocating the market they gave them a period of time so that there would be a gradual transition, and I think that this could be done in the case of the reserve system clause that wouldn't dislocate baseball horrendously and wouldn't cause any chaotic conditions.

[1966] Q. Would you expect that if there were such a phasing out of the reserve system or a gradual elimination

of it, would you expect that during that time and at the end, when the reserve system no longer existed, the wealthy clubs would buy up all the talent? A. Well, may I correct myself?

Q. Please. A. I feel that there should be some kind of a contractual relationship extending over a period of years. In other words, you say when it is removed. I don't mean that. I don't mean it should stop and there should be nothing in its place.

Q. What would you substitute for it, Mr. Veeck? A. Well, I would substitute a different form, a modified form of a reserve clause running over a period of years.

The Court: Will you expand on that? That is really what is the real purpose of your testimony. You go on and tell us what you think, what you believe should be the substitute for the present system.

The Witness: No, you must understand, your Honor, that I am not legally equipped to discuss the legalities of this. I am talking from a philosophical standpoint only.

The Court: We want it within the orbit of your under-
[1967] standing.

The Witness: There are, I believe, several alternative plans that would be possible. One of them would be the substitution of a movie contract—movie in quotes—such as they use over a period of years in Hollywood to reserve the uses of the talents of the actors and actresses to a particular company. Obviously this would take tailoring by legal minds to make it fit baseball. But let us say that they did operate on the seven-year movie contract which called for scheduled raises at scheduled option periods. In other words, if you signed a contract, a potential star or a potential starlet to a contract, her original contract would call for, at the end of a year, a specific increase, at the end of two years, as her value increased, a greater increase, and so on to the expiration of the seven-year contract.

Now, this seven-year contract is renewable at any time. In other words, if you had had a star who is made a star

by a couple of pictures, obviously he was bringing in more income to management than his recompense, at which time they could renegotiate the contract and extend it again another seven years. That is, in my opinion, an alternative.

The football contract that is used by the NFL and the AFL—well, they are all one now—with some modification is a potential form of contractual relationship.

[1968] The Court: Does that have your hearty approval?

The Witness: Well, with one exception, your Honor.

The Court: To wit.

The Witness: You see, suddenly, after this contract was originally negotiated and after Mr. R. C. Owen had left the San Francisco club and gone to Baltimore, suddenly they decided that there should be a change in the contract and that is that the club should be entitled to just recompense for the loss of the services of the player. But such just recompense was to be determined by the two owners, and failing to agree on a fair amount, then the Commissioner would have the right.

Now, this has the difficult problem of no one knowing if they entered into negotiations with the player who had played out his 10 per cent option and was, to all practical purposes, a free agent, but not knowing what they would have to give for his services, so obviously this limited one's willingness to enter into a transaction, the end of which you can't guess, so that the limitation, I suggest, is that I think it is possible, in the case of the development of a baseball player, to estimate with some degree of accuracy, if one has all the figures available as to the costs, the cost of developing that particular and specific individual to a point where he has become, in quotes, [1969] a major league player; that the club surrendering his contract is certainly entitled to this development cost.

From then on it seems to me that the club has had the value of his services for a period of time and that they should have, or otherwise they wouldn't have continued to hire him, felt that there was a value to the services and

that that value must have repaid them for the development, if we will, of being a rookie to becoming a good ballplayer.

Q. Mr. Veeck, these two possible substitutes for the reserve system that you have discussed, first, the Hollywood kind of contract and second, the pro football kind modified as you have suggested, in your view does the adoption of either of those substitutes operate to the prejudice of the management interest in baseball today? A. I don't believe so.

Q. Could you tell us why not? A. Well, it appears that the great fear that operators have, and I, too, have had misgivings from time to time, even when I was operating, that there might be an opportunity for all the talent to gravitate maybe to a few clubs. I do not believe that to be true. I don't really think that the talent would gravitate to the wealthy clubs, and that seems to be the greatest worry, along with one that there would be an increase in unfortunate incidents in the game, that it would [1970] destory the competition and the desire to compete.

Now, if I may answer these backwards; insofar as the latter is concerned, I do not believe, and I refuse to believe that football players who have played out their options, play less well the last year when they know they are taking a 10 per cent reduction, in order to play out their option; I refuse to believe this. I don't believe, for instance, that Jim Nance of the Boston Patriots could have had a much better year than he had last year, even though he played out his option. I don't believe that once a contract is agreed upon and it is a fair contract, and both sides feel that it is a fair contract, that in my opinion ballplayers do not play for money, but play for pride. It is my opinion that they would continue to play for pride.

Now, I have heard some conversation that, before the adoption of a reserve clause, that in the '80s and '90s there were a lot of ballgames played under suspicious circumstances and there were games being played back and forth,

but with the adoption of the reserve clause there were also some games played under rather strange circumstances, like in 1919, and I don't think that you are going to change the nature of the animal. I think that you always have to be vigilant, but I do not think that the ab- [1971] sence of a continuing reserve clause would affect the legitimacy of the athletes. That is the first thing.

The second one, insofar as the ballplayers gravitating to the wealthy clubs, we first have to address ourselves to what constitutes a wealthy club. Is it a fellow's personal fortune? But he usually has a corporation operating the club, and the club is operated by the corporation with the exception of Mr. Tom Yawkey. I know of very few people who have ever put up as much or anywhere near as much money individually. He loaned money to the franchise, and he is, in my opinion, a very fine sportsman. But I don't know many people who have been in a similar position who have advanced funds.

Let us take, for instance, the case of the Yankees. The Yankees' dominance of the American League is, in my opinion, not because they were the wealthiest club, because they weren't, with Mr. Topping and Mr. Webb, and even before with Mr. Ruppert, but they did have in their employment three remarkably good scouts, a fellow by the name of Joe Devine from the West Coast, a fellow by the name of Bill Essick from the Middle West and a fellow by the name of Paul Kritchell from the East Coast, and though it grieves me to say it, they had probably the best administrator in the game in a fellow by the name of George Weiss, with whom I did not see [1972] eye to eye on much of anything except that he is a very talented man, and it is, in my opinion, these three fellows rather than any wealth that controlled and guaranteed the steady flow of talent to the Yankees.

Now, the Yankees, when these three fellows died or retired, the result was not one that you could see immediately, because they had this continuous flow of talent, but it

was one that insured for another decade that they would have the best ball clubs and they did.

So I think that this is not a question of the dollars. I think that it is a question of the ability of the people operating and their willingness to work hard.

It has been said with some degree of reason, I think, that those people who have become extremely wealthy and extremely successful are less likely to be hustling and scuffling and working. It seems to me also that if you look historically, the St. Louis Cardinals certainly were not the wealthiest operation under Mr. Rickey and Mr. Sam Braden, yet Mr. Rickey devised a system which made the Cardinals a tremendous power, not only in the National League, and not only from the players that they had on their team, but from the players they adopted or developed in abundance and were able to trade elsewhere and sell elsewhere.

I feel that it is not at all possible for one club [1973] to corral all the talent and buy it. Mr. Yawkey once tried to buy some very outstanding ballplayers and put together a winning team which failed, and scufflers like I am were able to get lucky in Cleveland with a little town and draw some people. So I don't think that this is a worrisome problem. I do not think they will gravitate.

Q. You mentioned Mr. Yawkey, Mr. Veeck. Just so the record may be complete, that is Mr. Tom Yawkey? A. Mr. Tom Yawkey.

Q. Of the Boston Red Sox? A. The owner of the Boston Red Sox.

Q. So that in your view neither of these substitutes that we have been discussing for the present reserve system would necessarily operate to the detriment of the management side of baseball? A. No. I think that it is quite possible that they might work out to benefit management.

Q. And would they affect the level of competition on the field? A. I do not believe so.

Q. The level would remain high or be high? A. Well, the

level would remain as high as it is, if there were no further expansion.

Q. Now, in your view, would the adoption of either [1974] of these substitutes harm or benefit the players' interests? A. I believe that they would benefit the players in several ways.

Q. Would you please tell us what they are? A. First, I believe that everyone should once in their business career have the right to determine their future for themselves, whether one be an attorney—you shouldn't, just because a firm wanted you, be held by that firm forever in perpetuity. So that I believe that every person, every human being has a right to determine, at least once, some phase of his business life, as I say, either where he is going to play originally, which is precluded by a draft—at least for practical purposes it is, although theoretically I suppose one could outlast all the drafting periods and end up with one city—or to have the right to determine whether he wants to renegotiate with a different team after a period of time, after he has served his apprenticeship and returned value received to the club that did, in part at least, help to develop him.

The next thing I think is that in the matter of contractual negotiations there might be a little fairer balance arrived at between the ballplayers who are entitled to X number of dollars and those who get 3X. Once, when I was in Chicago many years ago, Mr. Philip Wrigley had an [1975] idea that he could try and pay the players yearly, starting with a base salary, and if they showed any improvement he would increase it without reductions from the base salary. But this became such a difficult thing to determine on the balance of, which would be the fair way—in other words, you were going to get paid today for what you did today and a year hence you would get paid for what you did a year hence and so on for the balance of your career. But it was very difficult to determine and to keep it a workable process, doing it monthly, and it was

abandoned. But I do think that there are a lot of ballplayers, a lot of ballplayers who would profit by being able at some time to go or to renegotiate a contract in place of leaving. I think there are some ballplayers who are not playing because in this particular club there are other athletes who may be just a step better than they, but who could play with many other teams, and I think to some extent this would spread the talent more fairly, and if one could play out their option and then renegotiate with another club, I think this would be beneficial to the game itself, and I think there would be a tendency then to balance the talent.

Q. Would the adoption of these substitutes, one or other of these substitutes, in any other way benefit the players' interests? [1976] A. Well, I think that it would certainly help the players in the game itself to no longer be one of the few places in which there is human bondage. I think it would be to the benefit of the reputation of the game of baseball, and I would like to mention just for the record, I happen to think of baseball as the greatest team game there is. I don't happen to agree with all they do, and often I am very unkind about my satements, but I still think it is a game that deserves to be perpetuated and to restore it to the position of honor it once held, and I think this would be a step in that direction. At least it would be fair.

Q. In your view would employer-employee relations in baseball be furthered or disadvantaged by reason of the adoption of either of these substitutes? A. That is a very difficult question. I can't really make an honest answer because over a period of time, at first there might be some feeling that management had been outwitted or vice-versa, but I think that over a period of time it comes to—I don't believe that most athletes want anything but a change, a small change, a step in a direction, and I think that if they got that, the relationship would be much better between player and management, if you call it that.

Q. Mr. Veeck, we have been discussing two possible sub-

stitutes for the reserve system. Are there any others [1977] in your judgment that might be— A. Yes, I think there are other variables on the theme. I think that it might be possible to operate under two kinds of contracts, one taking into effect the development period to be superseded by a five-year contract once a ballplayer arrives in the major leagues on a permanent basis.

Q. Have you thought of any other possibilities? A. Yes, but I must admit at present I have a complete blank on them.

Q. It has been suggested in testimony here, Mr. Veeck, that the reserve system as it operates today is indispensable in order to protect the clubs' cost of developing players in the minor leagues and in their first years in the major leagues. Would it be your judgment that the reserve system, as it operates today, is indispensable to that end and is the only way to secure a flow of new player talent to the major leagues? A. Well, no, I don't think it is the only way.

Q. Would you expand on that, please? A. Well, there is direct and indirect subsidization of the minor leagues at the present time. It would seem to me that one of the things that could be done, which has nothing to do with the reserve clause or anything else, is the subsidization of college conferences rather than— [1978] Mr. Kauffman has suggested a way to expend the money to develop players which wouldn't necessarily take into consideration a reserve clause; that is the establishment of a baseball college. I think you will find that somewhere in the blue book there is a mention that since the supply of talent is less than the demand, that the limits on ballplayers should be reduced, that is, the number of players under control or held to a minimum. I don't think that the reserve clause has anything to do with the development of playing talent except in one respect, and that is that theoretically, and it is only theoretically, that if you don't have these subsidized minor leagues that you won't have a flow of players from them,

and I offer the fact that you can still subsidize the minor leagues directly and you can still have the advantages without keeping a fellow perpetually under a reserve clause; that under alternative plans it will work just as well in the minor leagues and might be better.

Q. Specifically what alternative plans would you envisage? A. Well, again I am talking about alternative plans of contractual relationship, of a movie contract which has nothing to do with, but pays the ball club for—wait a minute—a movie contract continued into a minor league [1979] contract which would start to recompense them if the player left.

Is that clear? That seemed to me a little vague. Let me—

The Court: Take your time. No one is rushing you.

A. If you had a contract operating until the player has become a major league ballplayer, and if he then signed a second contract as a major league ballplayer for a period of time, five years, seven years, and had the right at the end of that time to terminate the contract and negotiate for his services elsewhere, then the original club would be repaid for the amount that they had expended in getting him to be a major league ballplayer. So I don't see how this would affect adversely, and might affect favorably, the cost of development.

Second, if the player signs a movie type contract with a ball club, and upon the expiration of his contract or of his playing out his option, decides to go to another team and the original team is recompensed in dollars the cost of their development, then you have the same situation that exists today in football. Football has their players developed by colleges, and when they arrive, football has had, other than the cost of scouting, no cost for the players. In many cases this is not true of baseball. Baseball, in [1980] my opinion, being a more difficult game to play, takes more time to develop the players, so that there is some demonstrable cost. But if they receive that back, then when a ballplayer becomes a major league ballplayer he is in exactly

the same basis as a football player is coming out of college, and the football player has an option, has the right to play out his option, so how would it affect it if the baseball player had the same right?

Q. And in that way you envisage it would be possible to compensate a club for its player development costs— A. Yes.

Q. —and yet leave the player free to deal with someone else if he so desired? A. Well, for the player that is leaving. In other words, I don't believe that you can put all the costs of player development on one or two that you have that play out their option and go elsewhere.

Q. I see. Would it be your idea, Mr. Veeck, that a club might sign a player when he enters the minor leagues to a contract for a term of years which would run through his normally anticipatable period in the minors and for a few years into the majors? A. Yes, that is one possibility. That would be like the movie contract with the seven-year period, and they [1981] anticipate that when they first sign a young actor or actress, she is not going to be a great star, but they compensate for her development by increased salaries, and they then gain the benefit of this as they do become stars.

Second, you can do the same thing with almost any kind of contract, merely by extending its length. If it is five years in the major leagues that you want to achieve as a fair time before a fellow can renegotiate his contract or negotiate for himself, then it is quite possible you would add two years in the minor leagues to it or two and a half years, but this can be done by statistics and by figures.

Q. Would it be your judgment that on the average it would be possible for a club to recoup its development costs of a major league player by having him bound to it for a period of over five years? A. It would be, in my opinion, sir.

Q. It has been suggested here, Mr. Veeck, that in any system other than the reserve system as it operates today,

that is to say, in any substitute system where a player had some degree of freedom to go to another club, the result of that system would be that clubs would lose key players and their playing effectiveness would be destroyed.

Do you share that judgment? A. Well, it would seem to me that if you have a player [1982] that is so important that your team is built around him, that you would not be so foolish as to wait until the last day of his contract before renegotiating it.

It would also seem that one would exercise care in making sure that the ballplayer was reasonably happy and reasonably well content with his plight. It does seem to me that one of the things that ballplayers don't like to have happen is to have them disoriented. They like, after having played in a city for a period of years, they like to stay in that city, so there is an advantage to the club that originally has his contract, if this thing would operate, if he would spoil a team by leaving. There are a lot of so-called outstanding stars that have been traded, and that may change the balance of a club also—

[1983] Q. Mr. Veeck— A. Or sold, as I had to do on occasion to keep alive.

Q. Mr. Veeck, it has been suggested that some of the clubs, by reason of their gate receipts or their revenues from television and radio, have much greater resources than others and so, were there any relaxation of the reserve system, would be in a position to buy up all the talent.

You have told us already your views as to the likelihood of the clubs buying up the talent, but let me ask you this, if I may.

Are there techniques available by which the resources of the clubs from gate receipts and television and radio might be more evenly allocated? A. Yes. I once had the temerity to suggest that at a meeting, that the television moneys be pooled and that the visiting club get a larger share of the gate receipts, which would tend to balance the income and

reduce the number of disaster areas as compared to the clubs that are doing extremely well.

Obviously the larger markets have a greater potential television value and, if this money all were to be used for player development, I suppose in theory it [1984] would give them an advantage, but from the things I mentioned earlier, I don't think from a practical standpoint this is true. But I do think, and have thought for some years, that there should be an equalization of the extraneous advantages to a ball club such as television. After all, it takes two teams to put on a game, and I do think, particularly in the moving around that has happened in ball clubs, that the visiting club that also puts on a show might be entitled, as he is in football, to a larger share of the per game income.

Q. Do you know of any technological or other obstacles in the path of adopting such a higher degree of equalization? A. No, I don't know of any others. I think it would work.

Q. You made this suggestion, you said, at a meeting. Who attended the meeting? A. At a league meeting in Phoenix.

Q. Of the American League? A. Of the American League.

Q. When was that, approximately? A. Oh, that must have been about 1952.

Q. Was your suggestion adopted? A. No, it wasn't.

[1985] Q. Was a vote taken on it? A. I didn't get a second.

Q. Mr. Veeck, there has been testimony here that one possible modification that might be made in the reserve system would be the adoption of a rule whereby if a player and a club were unable to agree on the player's salary for a coming year, both the player and the club would have the right to arbitration of that dispute by an impartial arbitrator. A. I think that would be a splendid idea.

Q. In your view, would it hurt or help baseball? A. I think again it would help. I think that it would create a lit-

tle better relationship. Just the right to have an arbitration, the right not to be feeling that you are singly, as an athlete, negotiating against the wealth of a ball club, I think it would improve relationships. I think on many occasions that the club itself might profit a little bit, that on occasion ballplayers have been somewhat unrealistic in their various demands. So I think it would be beneficial from both ways.

Q. Mr. Veeck, in your judgment—you have invested in many baseball clubs—would modification of the reserve system along the lines that we have been discussing or adoption of one or another substitute for the reserve [1986] system deter investment in baseball? A. Well, I can only speaik for myself. If I were going to invest in a ball club it would not deter me.

Q. Your degree of eagerness would not be affected one way or another? A. No, not in the slightest.

Q. And would you expect baseball as a whole to prosper or suffer harm by reason of the adoption of any of these alternatives we have discussed? A. I think it would prosper.

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[1996] Q. Thank you. Can we agree that trades are so important to the game that when you traded Reynolds for Gordon of the Yankees in 1946, that trade had a great deal to do with your winning the pennant for the Indians? A. With both clubs winning pennants.

Q. Right. Can we agree that in the trading of Mr. Flood from Cincinnati to St. Louis, Flood got his chance to show his stuff and without that trade might never have been able to show his stuff with Cincinnati? A. That is a hypothesis that is not necessarily based on fact. It is pretty difficult to tell what might have happened. I am not that much of a wizard.

Q. Fine, I would like you to read into the record at this point what you said about Mr. Flood in The Hustler's

Handbook, Page 140 and 141. Let me show you the part I mean before you start. A. You mean I can select my—

Q. I am afraid not. It is The Hustlers. A. You only want parts of it?

Q. I want to make sure you read what relates to Flood. A. All right, I will try to.

Q. It starts there, as I understand it, and it [1997] ends there (indicating).

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[2001] Mr. Kramer: "Devine's first great trade at [2002] St. Louis, hindsight tells us, was getting Curt Flood from Cincinnati. This is a trade which is interesting because it illustrates an important point. Every major league club scouts every other club's players almost as thoroughly as it scouts its own. If you get interested enough to send out a top scout like Mayo Smith or Charlie Metro, for a full-scale appraisal, you'll end up knowing just about as much about the player as the ~~team that~~ owns him.

"Devine knew that Cincinnati had another centerfielder in their system, Vada Pinson, who looked as if he was one of the great prospects of all time. Pinson had everything Flood had, plus even more speed and considerably more power. When Cincinnati had Flood fooling around in the infield, that was the signal for Bing to make his move. Gabe Paul has never been famous for undervaluing his players. In this case, Cincinnati needed some relief pitching badly, and Devine was able to pry the 20-year old Flood away from him for three minor-league relief pitchers of exceedingly limited ability.

"Flood remained a good fielding, no-hit outfielder for the Cards for three years before he suddenly developed into a top big-league hitter. So the question remains: Just what would the Reds have done with him during those three years."

[2003] The Court: Now what question do you wish to address, if any, to the witness with respect to the exhibit just read into the record?

By Mr. Kramer:

Q. I want to know, Mr. Veeck, whether or not we can agree that in the trading of Mr. Flood from Cincinnati to St. Louis, Flood got his chance to show his stuff and without that trade he might never have been able to show his stuff with Cincinnati? A. I think that I said earlier that there is no question but that he did get a chance in St. Louis. I said also that there is no way to know whether he would have at some time been as successful in Cincinnati. There is no way to know that they wouldn't have moved Pinson to another position. There is no way of knowing what the result would be. But it is, as I have written in here, and I am not repudiating anything I wrote in here, although sometimes I'd like to, that he did get a chance in St. Louis that he may or may not have gotten in Cincinnati.

* * * * * * * * * * *

[2009] Q. Can we agree that if you can become a major league ballplayer it is a very good career for a young man? A. Yes.

Q. Not only because you can make good money playing big league ball, but because it opens up doors for a business career; isn't that right? A. Sometimes.

Q. Can we agree that baseball's pension plan is the best retirement program in the nation? A. Well, I am not familiar within the rest of the nation, but it is a fine pension plan.

Q. Can we agree that baseball clubs are at the same time both—and I mean major league clubs—are at the same time both competitors and partners? [2010] A. Yes.

Q. Can we agree that the combination of partnership and competition is inherent in any team league sport? A. Yes.

* * * * * * * * * * *

[2058] John J. Gaherin

The Court: Mr. Gaherin, we know you have been here before, but whenever a witness has completed his testimony and is called back, we reswear the witness.

Direct Examination by Mr. Hadden:

Q. Mr. Gaherin, were you present in court yesterday? A. Yes.

Q. Were you present and did you hear the testimony given by Mr. Miller on rebuttal? A. I did.

Q. Mr. Gaherin, let me read a question and answer or perhaps a series of questions and answers which appear in the record at 1883, being Mr. Miller's direct examination by Mr. Topkis.

"Q. (Line 23) Would you tell us, please, whether in signing that agreement"—and if I may interrupt myself, that is the first basic agreement which was under discussion—"Would you tell us, please, whether in signing that agreement you accepted the reserve system as it then stood? "A. No, your Honor, we did not."

Skipping to a further question in the same line of testimony on page 1884, line 14:

[2059] "Q. Did you make any statements to the representatives of baseball management to that effect, and if so, please tell the Court when and to whom you made such statements?"

And a portion of the answer which followed that question appearing on page 1885, line 2:

"The oral statement was made at either the final or next to the final negotiating session in trying to wrap up the agreement as a whole, and it was to the effect that we did not accept the reserve system as legal and that therefore we wanted the Player Relations Committee to know that when we agreed on a clause, for example, which is a normal clause, that we will do our best efforts to carry out the provisions of the agreement, that they should know that

the reserve clause we considered illegal and therefore we could, of course, not agree to use our best efforts to carry that out."

Do you recall that testimony, Mr. Gaherin? A. I do.

Q. Is it correct? A. No.

Q. Would you state what your recollection is as to that subject matter? A. My recollection is that at the meeting which prob- [2060] ably occurred in January of 1968, toward the end of the negotiations which culminated in the first basic agreement, there was discussion about the reserve clause and it was understood, the statement of the Association representatives was to the effect they expressed no view with respect to the legality of it; they did not agree, however, with our position that it was a legal document.

Q. And in the course of those discussions was there a reference by any representative of the Association to the statement of policy dated July 28, 1967, which is in evidence as Defendant Feeney's Exhibit O? A. Yes.

Q. What was that reference? A. The reference to the statement of policy was to the effect, again, that the Association's position, they did not state whether it was legal or was not legal; they simply had doubts as to its legality.

Q. Now, showing you, Mr. Gaherin, Exhibit O, let me refer you to the first paragraph at the top of Page 6, and I will ask you if you see the reference there to the question of legality of the reserve system? A. Yes.

Q. And what does the document say, sir? A. "In addition to placing the player in the untenable [2061] position of being required to accept the club's proposed salary or leaving organized baseball, the reserve clause is of doubtful legality."

Q. And is it your testimony that in the discussions or negotiations which were taking place in January 1968, that reference was made back to that statement? A. Yes.

Q. Was there anything else said in the January 1968 discussions or negotiations concerning the legality of the re-

serve system? A. Yes. My best recollection is that Mr. Moss, in commenting with respect to the status of the reserve clause, said that part or considerable of their doubt concerning its legality was to be found in an increasing body of law concerning these matters which cast a doubt upon the legality of it, and I believe he referred to one of the cases that was in that category, it was the Rick Barry case.

Q. Which was then in litigation? A. Which was then in litigation, and I think there was also reference to, as I recall it, another case which was in Pennsylvania.

Q. And did the representatives of the clubs, yourself included, press the Association for a statement of their position on the legality of the reserve system at that time? [2062] A. Yes, we did.

Q. And what response was received? A. They expressed no position with respect to the legality of the reserve clause except—

Q. That is, they refused to do so? A. They refused to do so.

Q. Does that complete any discussion which you recall concerning the legality of the reserve system as it took place during the negotiations on the first basic agreement? A. Yes, sir.

Q. And I think your direct testimony is to the effect that the next consideration of the reserve system between the parties was during the joint study of the reserve system which took place in the spring and summer of 1969, is that correct? A. Yes, sir.

Q. Was there any discussion during the course of that study as to the legality of the reserve system? A. Yes, sir.

Q. Would you tell the Court what was said, in substance? A. Yes. The representatives of the Association urged upon us as one of the motivations for amending the reserve structure the possibility that some person other than the Association might mount an attack upon the legality of the [2063] reserve system and if he were successful in that attack, cast the whole matter into chaos.

Q. And did the Association's representatives voice concern with respect to that possibility? A. Yes. They said that they were as concerned as we should be for the result of such a situation.

Q. And did they state that the players were concerned about that also? A. Yes, they did say that the players were concerned.

Q. In the course of the joint study—and if you would refer in your answer, please, to any writings that changed hands during the study, as well as oral statements—were there any other statements made by the Association which expressly or by implication cast doubt upon the reserve system? A. No, neither orally nor in the—I guess you would call it a position paper that was given to us during the course of the study, probably some time in June of that year.

[2064] Q. And handing you what is in evidence as Defendant Feeney Exhibit Q, is that the position paper to which you refer? A. Yes.

Q. Referring again to Mr. Miller's testimony of yesterday, Mr. Gaherin, let me read some of his testimony. Page 1889, Line 12, Mr. Topkis examining Mr. Miller.

"Q. When the news of Mr. Flood's impending suit became available, did that news have any impact upon the discussions which you were having? "A. No."

Going over to a continuation of that subject matter, Mr. Miller answering on Line 6, Page 1890.

"There was no difference whatsoever in the nature of the discussions before it was known that Curt Flood intended to file suit and after it was made known that Curt Flood intended to file a suit. As a matter of fact, there was not even any conversation between the parties concerning the news about the suit.

"Q. Did discussion about the reserve clause—

"Mr. Hughes: Excuse me just a moment. For my benefit, are you now talking about conversations prior to the actual commencement of the action? Is that where we are?

[2065] "The Witness: Yes."

You heard that testimony, Mr. Gaherin? A. Yes.

Q. Is that true and correct? A. No.

Q. Will you tell us the respects in which it is inaccurate? A. Before the actual suit was filed, when we were aware of the possibility of the suit we had a discussion across the bargaining table one day, the two negotiating committees, that of the Association and that of the Player Relations Committee, to the effect that we said that if Flood—we were told that—we told them that we considered any action by Flood or by them helping Flood in this action as violative of the commitment that was made in the basic agreement for the parties to do their best—make their best effort to see that all provisions of the Uniform Player's Contract were carried out and we did not consider the Association's assistance of Flood in this act as a fulfillment of that commitment.

Q. What response was made by the Association's representatives? A. The Association's representatives said that they had talked to Mr. Flood and had endeavored to dissuade [2066] him from the course which he had elected and that, in any event, no suit was then pending. And there was some discussion as to whether or not an anticipatory breach, I think was the term used, was also violative of this commitment.

And the reply was that we were not—did not know whether they had used their best efforts and in their belief and judgment they had used their best efforts to prevent Mr. Flood from pursuing this action.

Q. Now, Mr. Gaherin, subsequent to the filing of the Flood complaint, what discussions took place with reference to the Flood lawsuit in the course of the further negotiations? A. Well, after the lawsuit was filed?

Q. Yes, after it was filed. A. We continued to discuss the matters that were proposed by the Association and some time in early February, as I recall it, February 5 or 6, if my recollection is correct, a proposal that was on the table

since the preceding year was withdrawn from the table by the Association and a group of proposed amendments to the reserve clause was proposed, including the football clause, and we continued to talk about these things in the context of the total negotiation that was going on.

Q. And when, if at all, did the subject of the Flood [2067] suit again intervene in the discussions, in the negotiations? A. Well, really the next time the Flood suit became involved in the negotiations was at that point toward the end of February or middle of February when the Association representatives were preparing to have their meeting of their executive board and their subsequent meetings with the player personnel, and the proposal that we were urging upon them so far as reserve clause was the maintenance of the status quo, the continuance of the present system in the successor agreement, a proposal which they would not agree to.

And incidentally, your Honor, I see in reading my testimony of the other day I misspoke. I said that the Association was not willing to talk about amendments to the clause following the filing of the suit. They were willing to talk about amendments. It was a continuation of the clause in its present form as part of the agreement which they objected to.

Since they were no longer willing to talk about a basic agreement which included the reserve clause in the form that we had proposed it and since both sides were desirous of reaching an overall settlement of the dispute, a way had to be found to proceed, and the Associa- [2068] tion made it very clear that they could not agree to a basic agreement which contained the reserve clause on the basis that if they did so it would be damaging to this action, that if in fact it was part of the existing basic agreement at that time, the one which expired on April 5, under no circumstances would they agree to its continuation in another successor agreement, and that was the next time that the reserve clause became a part of the conversation.

Q. And was it at that time, Mr. Gaherin, that you expressed or the clubs' representatives expressed to the Association their agreement with that general concept and was it at that time that you expressed the statement as you said it in your direct testimony, that it was difficult to ride two horses galloping in opposite directions? A. Yes. We said we could not undertake to continue negotiations which appeared on the bargaining table to have for their purpose amending the clause while at the same time involved in a legal action which had for its purpose its total destruction. Mr. Miller yesterday, did any representative of the Associa- with major league baseball until the testimony given by Mr. Miller yesterday, did any representative of the Associa tion ever state to you or, to your knowledge, to any other representative of major league baseball the flat [2069] assertion that the reserve clause was illegal? A. No, sir.

. . . . . .

[Def. Kuhn's Exhibit A]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action 70 Civ. 202

CURTIS C. FLOOD, *Plaintiff*,

against

BOWIE K. KUHN, ET AL., *Defendants*.

Stipulation No. 1

All of the parties hereto, by their respective counsel, hereby stipulate and agree, for the purposes of this action and only this action, as follows:

(a) The statements set forth below in paragraphs 1 through 41 are true and correct; and

(b) All parties herein waive all grounds of objection, except objection based on grounds of irrelevancy or immateriality, or both, to the introduction into evidence at the trial of the statements in paragraphs 1 through 41.

82nd Congress

1. In 1951, the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary conducted an investigation into organized baseball. Three identical bills pending before the Subcommittee provided a complete exemption from the antitrust laws for "organized professional sports enterprises." The Subcommittee held 16 days of hearings, receiving testimony from 33 witnesses. In 1952 the Subcommittee published its report entitled "Organized Baseball." None of the bills was reported from the Subcommittee.

2. On the day that the House bills were introduced, Senator Johnson of Colorado introduced S.1526 which was almost identical with the bills introduced in the House. It was referred to the Judiciary Committee, which assigned it to the Antitrust Subcommittee. S. 1526 was reported by the subcommittee without hearings. On July 1, 1952, the Judiciary Committee voted to postpone its consideration indefinitely.

3. In 1953 Senator Johnson of Colorado introduced S. 1396, a bill which would permit organized baseball to adopt rules regulating the broadcasting or telecasting of major league games into areas other than their home territories.

4. S. 1396 was referred to the Committee on Interstate and Foreign Commerce. Five days of hearings were held before the Subcommittee on Televising Baseball Games at which representatives of the Major and minor leagues testified. The bill was reported favorably with amendments by the Committee on Interstate and Foreign Commerce on June 10, 1953 (S. Rept. 387, 83rd Cong., 1st Sess.). On July 8, 1953, there was a brief discussion of the bill in the Senate (99 Congressional Record, p. 8191 et seq.). No further action was taken on this measure.

5. In 1954 Senator Johnson of Colorado introduced Senate Joint Resolution 133. The resolution provided that the antitrust laws apply to any team in organized baseball which is controlled directly or indirectly, in whole or in part, by any individual or organization which was engaged in the sale or distribution of alcoholic beverages. The resolution was referred to the Senate Committee. Hearings were held by the Antitrust Subcommittee at which witnesses representing the Government, organized baseball, and the brewing industry testified. The resolution was reported from the Antitrust Subcommittee on June 19, 1954. On August 2, 1954, the Judiciary Committee postponed its consideration indefinitely.

6. In February 1954 Representative Celler introduced H. R. 7949, which would make the antitrust laws applicable to all forms of trade or commerce unless specifically exempted by statute. The bill was referred to the House Judiciary Committee, which did not act upon it.

84th Congress

7. No bills were introduced in the 84th Congress concerning the antitrust status of professional team sports.

8. In 1957 several bills relating to the antitrust status of professional team sports were introduced in the House. Among them were H. R. 5319, 5383, and 6876.

9. The bills, which were referred to the House Judiciary Committee, proposed three types of legislation:

(1) The first provided that baseball, like other team sports, should be subject to the antitrust laws and that the courts be permitted to determine upon the facts of each case whether any particular agreement or practice constituted an unreasonable restraint of trade.

(2) The second provided for a complete antitrust exemption for the professional team sports as well as for acts in the conduct of such enterprises.

(3) The third provided that all professional team sports be placed under the antitrust laws and that certain practices be specifically exempted from those laws.

10. In the summer of 1957 approximately 50 witnesses testified in 15 days of hearings before the House Antitrust Subcommittee on these bills. No action resulted.

11. On January 30, 1958, Representative Celler introduced H. R. 10378. The bill declared that the professional team sports of baseball, football basketball, and hockey come within the purview of the antitrust laws, but exempted from those laws such activities of team sports which were "reasonably necessary" to those ends:

(1) the equalization of competitive playing strengths;

(2) the right to operate within specified geographic areas; or

(3) the preservation of public confidence in the honesty in sports contests.

12. The bill was referred to the Judiciary Committee. No hearings were held.

13. H. R. 10378 was reported favorably by the House Judiciary Committee on May 13, 1958. On June 17, 1958, four identical bills were introduced in the House which were to be offered as substitutes for H. R. 10378 which was at that time on the House Calendar. On June 24, 1958, H. R. 10378 as amended, was passed by the House. These amendments eliminated the words "reasonably necessary" and enlarged the areas of exemption to include the following:

(1) the employment, selection, or eligibility of players, or the reservation, selection, or assignment of player contracts; and

(2) the regulation of rights to broadcast and telecast reports and pictures of sports contests.

14. On June 27, 1958, Senator Hennings, for himself and others, introduced S. 4070, which was identical with H. R. 10378, as passed by the House. The Senate antitrust Subcommittee, to which both bills were referred, held 12 days of hearings in July, 1958 at which 37 witnesses representing all team sports and other interests testified. On August 1, 1958, the subcommittee tabled both bills. No further action was taken on them in the 85th Congress.

86th Congress

15. In January, 1959, Senator Hennings, for himself and others, introduced S. 616. The bill was similar to S. 4070 introduced in the previous Congress, differing only in its application to the telecasting and broadcasting provisions.

16. In February, 1959 Senator Kefauver introduced S. 886 which with some limitations provided the exemptions proposed in S. 616. The limitations provided that the exemptions would not be effective if any major league baseball club controlled more than 80 players at any one time. Additionally, a player had to give his consent before he could be subjected to a league draft. The bill provided that baseball and

football could completely regulate the right to operate within specific geographic areas, provided that such a geographic area could not exceed a radius of 35 miles from the baseball park or football field. This exemption did not apply to cities having a population of more than 2 million. Further, the exemption relating to the regulation of telecasting and broadcasting was to be based upon a finding by the Federal Communications Commission that any agreements or contracts by leagues be reasonably necessary. The bill was to be effective for a period of 4 years, to enable the Congress to reexamine the situation.

17. Hearings on S. 616 and S. 886 were held by the Antitrust Subcommittee in July, 1959. Witnesses included representatives of football and baseball.

18. Shortly thereafter Senator Kefauver, for himself and others, introduced S. 2545. This bill excluded organized baseball. S. 2545 was reported favorably with minor amendments by the Antitrust Subcommittee to the Judiciary Committee on September 2, 1959. On June 13, 1960, S. 616 and S. 886 were reported to the Judiciary Committee. On that day the Judiciary Committee indefinitely postponed consideration of S. 616, S. 886 and S. 2545.

19. In May, 1960, Senator Kefauver introduced S. 3483. This bill contained two titles. Title I applied to football, basketball, and hockey and was similar to S. 886. Title II applied to baseball and this also was similar to S. 886. There was an additional section in Title II prohibiting the existing major leagues of organized baseball from hindering the formation of additional major leagues.

20. Hearings were held on S. 3483 in May 1960 with testimony presented by organized baseball and representatives of the newly formed Continental League. The Judiciary Committee received S. 3483 from the Antitrust Subcommittee and reported it to the Senate with amendments and without recommendations on June 20, 1960. (*S. Rept. 1620*, 86th Cong.)

21. S. 3483 was called up in the Senate on June 28, 1960. The bill was amended by striking out Title II,

which applied solely to baseball and included baseball in Title I. Thereafter, the bill was recommitted without instructions to the Senate Judiciary Committee. No further action was taken on any of the proposed bills during the 86th Congress.

22. In the House of Representatives during the Congress seven bills were introduced pertaining to the antitrust status of professional team sports. Six of the bills were identical, except for provisions relating to telecasting and broadcasting, to H. R. 10378. 85th Congress, as passed by the House. Another bill proposed a complete exemption from the antitrust laws for organized professional team sports. The bills were referred to the Judiciary Committee.

23. Hearings on these proposals were held by the House Antitrust Subcommittee in September 1959. Testimony was received from the commissioner of baseball, three members of the House of Representatives, and four officials of television stations. No further action on any of the bills was taken by the House.

87th Congress

24. On January 5, 1961, Senator Kefauver introduced S. 168 which was similar to S. 3483 as introduced in the 86th Congress.

25. On May 11, 1961, Senator Hart, for himself and others, introduced S. 1856, which was similar to many of the bills introduced in prior Congresses. No hearings were held on these bills. They were reported by the Antitrust Subcommittee to the Judiciary Committee without recommendation on September 12, 1961. The bills were discussed by the Judiciary Committee, but no further action was taken on them.

26. Early in this Congress three bills, similar to S. 1856, were introduced in the House of Representatives. The bills were referred to the Judiciary Committee where no action was taken on them.

27. On August 16, 1961, Senator Kefauver introduced S. 2427 which would permit the member clubs of a

league in the organized professional team sports to pool their individual television rights for sale by the league as a package. The text of Senator Kefauver's bill was that of the television pooling section of S. 168 introduced by him earlier in the session.

28. On August 17, 1961, Representative Celler introduced H. R. 8757, which embodied the same provisions as S. 2427 except that there was no prohibition against the telecasting of professional football games at those times traditionally used for the playing of intercollegiate football games.

29. Hearings on H. R. 8757 were held by the House Antitrust Subcommittee on August 28, 1961. On September 7, 1961, Representative Celler introduced H. R. 9096 which was similar to H. R. 8757, but included a prohibition relating to the telecasting of professional football games at times traditionally used for the playing of intercollegiate football games. H. R. 9096 was passed by the House on September 18, 1961, and was adopted without change by the Senate on September 21, 1961. It became law on September 30, 1961 (Public Law 87-331). The Act expressly includes baseball as one of the sports whose members may pool television broadcast rights.

88th Congress

30. On December 16, 1963, Senator Hart, for himself and others, introduced S. 2391 which was similar to S. 1856, 87th Congress, except for the provision in the prior bill relating to telecasting. Hearings were held by the Antitrust Subcommittee in January and February, 1964, at which testimony was received from representatives of all organized professional team sports. On July 20, 1964, the bill was reported to the Judiciary Committee. The Judiciary Committee reported S. 2391 favorably and without amendment to the Senate on August 4, 1964 (*S. Rept. 1303*, 88th Cong.). No action was taken by the Senate on the proposal in the 88th Congress.

31. Fourteen bills identical to S. 2391 were introduced in the House of Representatives. All of the

bills were referred to the House Judiciary Committee. No hearings were held and no action was taken on any of the proposals in the House.

89th Congress

32. On February 2, 1965, Senator Hart and others introduced S. 950, which was similar to S. 2391 of the 88th Congress. The bill was reported favorably by the Judiciary Committee on July 16, 1965 (*S. Rept No. 462*, 89th Cong., 1st Sess.). The bill recited that the professional team sports, including baseball, are within the purview of the antitrust laws. It also provided for *inter alia*, an antitrust exemption for professional sports agreements and rules relating to (1) the equalization of competitive playing strengths, and (2) the employment, selection and eligibility of players, and the reservation, selection, and assignment of player contracts. A third antitrust exemption in the bill would have permitted all professional sports leagues to grant member clubs the right to operate within specific geographic areas, and the fourth would have exempted agreements and rules relating to the preservation of public confidence in the integrity of sports contests.

33. Two attempts to amend the bill on the floor were unsuccessful. One, by Senator Ervin, would have prevented baseball from drafting free agents while they are still in college. The other, by Senator Proxmire, would have provided an exemption for a club to operate within specific geographic areas only if the league in which the club is a member requires revenues derived from radio and television broadcasting to be divided equally among member clubs. After rejection of these two amendments, the Senate passed S. 950 on August 31, 1965. However, S. 950 was never acted upon in the House Judiciary Committee.

34. Three bills were introduced in the House during 1965 but also were not acted upon by the House Judiciary Committee. One, H. R. 1785, was identical to S. 950. H. R. 6 and H. R. 3412 provided that the antitrust laws apply to baseball without specific exemptions.

35. In 1966, one bill, S. 3817, was introduced in the Senate and H. R. 17661 and 24 other bills were introduced in the House to provide legislative sanction for the announced merger of the American and National Football League. The Senate bill was reported favorably by the Judiciary Committee (S. Rept. No. 1654, 89th Cong., 2d Sess.). The bill also amended the 1961 broadcasting Act to prohibit pro football telecasts at times traditionally used for high school as well as college football contests.

36. S. 3817 passed the Senate by voice vote on September 26, 1966 and was referred to the House Judiciary Committee. The Committee held three days of hearings on the bill but failed to report it. However, on October 14, 1966, Senator Dirksen amended, on the floor of the Senate, a House-passed bill to suspend the investment tax credit (H. R. 17607) by tacking on as a rider provisions having similar effect as those of S. 3817. The bill, as amended, passed the Senate the same day. The football merger rider survived the House-Senate conference and was subsequently approved by both the House and Senate. It became public Law 89-800, 80 Stat. 1508, on November 8, 1966.

37. Three bills were introduced in 1966 to make minor amendments to the television provisions of the 1961 Act, but none was acted upon. Two, H. R. 15424 and H. R. 15460, would have made the home game black-out provisions inapplicable to a UHF television station located "more than forty miles from the main post office of the city of the game site." The other H. R. 18471, would have extended the 1961 Act to include professional soccer.

90th Congress

38. During 1967 the following legislation dealing with professional team sports and the antitrust laws was introduced:

(1) Representative Zablocki introduced H.R. 6, which provided that the Sherman and Clayton Acts are applicable to baseball. Representative Davis

introduced a similar bill, H.R. 467, except that it also provided that the Federal Trade Commission Act applies to baseball.

(2) Two bills, S. 1233 and H.R. 7652, provided for application of the 1961 Act to professional soccer.

(3) H.R. 11508, sponsored by Representative Ottinger, would have amended the Federal Communications Act to give the FCC authority to issue regulations to insure that television networks operate in the public interest. Such regulations were to include, but not be limited to, provisions (1) prohibiting a network from controlling a professional sports team, (2) prohibiting a network from withholding the telecast of any professional athletic contest from an affiliate station, except one in the area where the contest takes places, and (3) prohibiting a network from agreeing to interrupt or suspend an athletic contest to broadcast an advertisement.

No action was taken on any of these bills.

39. In 1968, no legislation concerning the antitrust laws and professional team sports was introduced.

91st Congress

40. In January 1969, Representatives Zablocki and Davis of Wisconsin introduced H.R. 60 and 2349, respectively, both of which provided that the antitrust laws apply to baseball. On December 8, 1969, Congressman Rivers introduced H.R. 15128 to amend the 1961 broadcasting Act by prohibiting agreements which prevent broadcasting of professional sports contests in the home territory of the home team when the game is sold out three days prior to the date it is to be played. No committee action has been taken on any of these House bills.

41. On April 16, 1970, Senator Magnuson, for himself and five other Senators, introduced S. 3725, which would, from the date of its enactment, make Sections 1, 2 and 3 of the Sherman Act applicable to professional baseball. The bill was referred to the Senate

Judiciary Committee, which has not, as of the date of this stipulation, held or scheduled hearings or otherwise taken action on it.

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Dated: May 19, 1970

[Def. Feeney et al.'s Ex. N]

Clubs' amended proposal for complete disposition of all outstanding issues.

TERM OF AGREEMENT

Three years—effective as of January 1, 1970.

Scheduling Rules and Number of Games in a Season

Retain 162-game schedule and scheduling agreements as now existing. Provide additional scheduling agreements regarding split doubleheaders, one-day stands, exhibition games, getaway games, starting hours, open days, twi-night doubleheaders and rescheduling.

See Clubs' proposal, attached thereto as Attachment "A", for details.

Reserve Clause

Basic Agreement shall not deal with reserve system. No duty to bargain on this subject during the pending litigation of *Flood* v. *Kuhn et al.* See Attachment "B".

World Series and League Championship Player Pools

Create one pool combining player pools from World Series and Championship Series. Contribute to this player pool as follows:

(a) 60% of gate receipts from first 4 World Series games, after deducting 15% for Commissioner's office (no change from present rule), and

(b) 60% of gate receipts from first 3 Championship Series games, after deducting 10% for Clubs' expenses.

This proposal would increase players' participation in Championship Series gate receipts from approximately 42.5% (estimated, with Club expenses at the same level as

reported for 1969) to 54%, a dollar increase of approximately $161,000 based on the 1969 figures.

The proceeds of the players' pool to be distributed as follows:

World Series Winner	36%
World Series Loser	27%
Championship Series Losers (2)	25%
2nd Place Teams in each of the four (4) Divisions	9½%
3rd Place Teams in each of the four (4) Divisions	2½%
	100%

MINIMUM SALARY

1970 Season — $12,000
1971 Season — $12,750
1972 Season — $13,500

} Fixed Increases. (No Cost of Living adjustment)

SPRING TRAINING RULES AND ALLOWANCES

A married Major League player with 60 or more days of service on a Major League roster may live away from the Spring Training Headquarters with his wife and family, unless the Club can demonstrate good cause for not permitting him to do so.

A Major League player permitted to live away from the Club Spring Training Headquarters shall receive a room allowance equal to what the Club actually saves on hotel expenses by reason of the player not staying at the Club hotel. Where the Club owns its own facilities (such as Pittsburgh, Los Angeles and Houston) and there is no saving, the Club will allow $3.50 per day in addition to the applicable allowance for meals.

Other players with consent of the Clubs may be permitted to live away from the Spring Training Headquarters.

MEALS (Spring Training)

1970	$13.00 per day
1971	$14.00 per day plus Cost of Living adjustment to the nearest $.50 *
1972	$14.00 per day plus Cost of Living adjustment to the nearest $.50 *

MISCELLANEOUS ALLOWANCE (Murphy Money)

1970	$50.00 per week
1971	$50.00 per week plus Cost of Living adjustment to the nearest $.50 *
1972	$50.00 per week plus Cost of Living adjustment to the nearest $.50 *

MEALS IN SEASON

1970	$16.00 per day
1971	$17.00 per day plus Cost of Living adjustment to the nearest $.50 *
1972	$17.00 per day plus Cost of Living adjustment to the nearest $.50 *

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* For the purpose of this memorandum, a salary or allowance figure shall be adjusted for the cost of living as follows:

To adjust effective for the 1971 season, multiply the salary or allowance figure for the 1970 season by a fraction the numerator of which is the Consumer Price Index for Urban Wage Earners and Clerical Workers published by the Bureau of Labor Statistics for November 1970 and the denominator of which is the Consumer Price Index for the month of November 1969; then add to this product the fixed increase, if any, in the salary or allowance figure for the 1971 season.

To adjust effective for the 1972 season, multiply the salary or allowance figure for the 1971 season, as adjusted, by a fraction the numerator of which is the Consumer Price Index for November 1971 and the denominator of which is the Consumer Price Index for the month of November 1970, then add to this product the fixed increase, if any, in the salary or allowance figure for the 1972 season.

Moving Allowances

In Season

Apply present paragraph 6 (e) (Moving Expenses) of Uniform Player's Contract or, at the player's election, reimburse him for reasonable and actual expenses for agreed-upon household items and transportation of player and immediate family if the player actually changes his permanent residence to the metropolitan area of the assignee club within 90 days of assignment of his contract.

Off Season (including during Spring Training Season)

Reimbursement for reasonable and actual expenses for agreed-upon household items and transportation of player and immediate family if the player actually changes his permanent residence to the metropolitan area of the assignee Club prior to the end of the All-Star break in the next succeeding season.

Supplemental Spring Training

Reimbursement for reasonable and actual expenses of transportation of player and immediate family from Spring Training Headquarters of the assignor Club to Spring Training Headquarters of the assignee Club.

Termination Pay

1970 Season — 45 days
1971 Season — 60 days
1972 Season — 60 days

The foregoing is to be applied so that only one such payment shall be made in any season, regardless of the number of times which a player is released, and the maximum amount of severance pay which a player shall be entitled to receive in any season shall not exceed the amount by which (1) the salary stipulated in the player's original contract for such season exceeds (2) the aggregate amount

which the player earns during that season from any club or clubs, including amounts deferred to later years, if any, and bonuses. In the event a released player refuses to accept a reasonable contract offered by a club other than the club which released him; such player shall forfeit that portion of the severance pay which would not have been payable if such contract had been accepted.

Grievance Procedure

Refer all grievances to three-man Arbitration Panel, with a Chairman unconnected with baseball, who is acceptable to both sides, provided that matters involving preservation of the integrity of, or maintenance of public confidence in, the game of Baseball may be decided by the Commissioner. Excluded from determination by either the panel or the Commissioner would be certain matters determinable only by collective bargaining or legal action. (See Attachment "C" for specific language.)

Maximum Salary Cut

Amend Paragraph 10(2) of the Uniform Player's Contract in the manner and to the extent necessary to provide for not more than a 20% cut in any one year, and a maximum cut of 30% over two consecutive years.

Article VII—Rule Changes

Clubs obligated to negotiate rule changes involving player benefits or imposition of obligations. See Attachment "D" for specific language.

Recognition

Clubs recognize Players Association as exclusive bargaining agency except for salaries above minimum and certain special covenants. (See Attachment "E" for specific language.)

Revision of Paragraph 5(b)

Revise par. 5(b) of Uniform Player's Contract to read as follows:

> "The Player and the Club recognize and agree that the Player's participation in certain other sports may impair or destroy his ability and skill as a baseball player. Accordingly, the Player agrees that he will not engage in professional boxing or wrestling; and that, except with the written consent of the Club, he will not engage in skiing, auto racing, motorcycle racing, sky diving, or in any game or exhibition of football, soccer, professional league basketball, ice hockey or other sport involving a substantial risk of personal injury."

Revision of Regulation 2

Agree to proposal of Players Association, as set forth in Attachment "F".

Winter League Play

No Major League player shall be required to play in the Winter Leagues, provided that this shall not bar a Club from recommending the advisability of such activity to any player.

No Discrimination

All provisions of this Agreement shall be applied without discrimination.

Representation at Individual Salary Negotiations

A player may be accompanied, if he so desires, by a representative of his choice to assist him in negotiating his individual salary with his employing Club.

Meetings With Players

Players Association to have the right to hold one team meeting in each clubhouse during spring training pro-

vided the Association gives the club involved as much advance notice as possible, but in no event less than five (5) days; such meeting to be approximately 60 minutes but not more than 90 minutes in duration starting with the normal reporting time of players on each club.

ATTACHMENT "A"

Clubs' Draft

Revised April 27, 1970

Article III

A. *Length of Season*

Clubs' proposal based on a 3-year agreement—162 games to be played during each season within term of Agreement.

B. *Championship Schedules*

On or before August 15th of each year, copies of the tentative Championship Schedules of the Major Leagues for the next ensuing season shall be presented to the Association and then promptly reviewed by the parties.

C. *Old Scheduling Agreements*

The parties recognize and incorporate herein as a part of this Agreement the following existing provisions governing the scheduling of Championship Games in the two Major Leagues, which shall continue in effect during the 1970, 1971 and 1972 Championship Seasons with regard to both original schedules and rescheduling:

(1) As to the National League: Paragraph 1 of the "Agreements Between Clubs and Player Representatives" appearing at pages 49-50 of the pamphlet prepared by the National League office for player representatives under date of May, 1965.

(2) As to the American League: The American League Regulations, Secs. 3.4(1), (3), (4), (5), (6), (7), and (8) and 3.11.

The scheduling provisions referred to in subparagraph (1) above shall be considered agreements between the Players Association and the 12 clubs of the National League or any of them, and the provisions referred to in subparagraph (2) above shall be considered agreements between the Players Association and the 12 clubs of the American League or any of them, for the purposes of the Grievance Procedure provided for in Article IV hereof, except to the extent modified in the next paragraph.

D. *Additional Scheduling Agreements*

1. The scheduling provisions incorporated herein by the preceding paragraph shall be supplemented and, to the extent necessary modified by the following:

(a) Split doubleheaders shall not be scheduled in the original schedule. As to the rescheduling of games as split doubleheaders, the matter will be reviewed by the parties promptly after the conclusion of each championship season during the term of this Agreement. With regard to the 1970 season only, games may be rescheduled as split doubleheaders when there is no practical alternative to doing so, bearing in mind the nature of the pennant race, the seating capacities of the parks involved, and the tradition of split doubleheaders in the cities involved.

(b) One-day stands will not be scheduled—except—as "openers" or doubleheaders to be followed by an open day.

One-day stands will not be rescheduled except as required to complete the Championship schedule.

(c) Not more than three exhibition games, excluding the All Star Game and the Hall of Fame Game, shall

be played by any Club during the Championship Season.

(d) A getaway game shall not be scheduled or rescheduled to start after 5 P.M. if either Club has a day game the next day in another city, provided that a getaway game may be scheduled to start at a later hour if neither Club involved is then required to travel between any pair of cities in which the in-flight travel time is more than 1½ hours.

(e) (1) A game will not be scheduled to start after 6 P.M. if either Club is scheduled to play a day doubleheader the next day.

(2) A game will not be rescheduled to start after 6 P.M. if either Club is scheduled to play a day doubleheader the next day unless such rescheduling is necessary to complete the Championship Schedule.

(f) Day games shall not be scheduled or (unless necessary to complete the Championship Schedule) rescheduled to start before 1 P.M., except such games may be scheduled to start between noon and 1 P.M. if both clubs either:

(1) Had an off-day the previous day, or

(2) Played an afternoon game starting not later than 5 P.M. or a doubleheader starting not later than 1:30 P.M. in another city the previous day, provided the travel time required in flight is 1½ hours or less.

(3) Played a game in the same city within the previous 24 hours.

(4) With the approval of the League President, not more than 6 games per league per year may be scheduled or rescheduled to start between

10:30 A.M. and Noon, subject, however, to the foregoing provisions of this subparagraph (f).

(g) Games shall not be scheduled or rescheduled to start later than 5 P.M. on getaway day if either Club is required to travel for a day game between cities in which the in-flight time is more than 1½ hours.

(h) (1) To the extent reasonably practicable, open days shall be scheduled following travel from the western time zone to the eastern time zone.

(2) To the extent reasonably practicable, open days shall be non-travel days.

(i) Home games which are scheduled or rescheduled away from the Park of the Home Club shall be considered road games for the purposes of player meal allowances, hotel accommodations and transportation.

2. *As to the Original Schedule*

Twi-night doubleheaders will be limited to three per home club per season.

3. *As to Rescheduled Games*

Only postponed, suspended and tied games shall be rescheduled, except as may be required to accommodate network television commitments or to comply with stadium leases.

4. *As to All Star Break*

(Same as old language, as updated)

ATTACHMENT "B"

Clubs' Draft 4/8/70

Reserve System

Regardless of any provision herein to the contrary, this Agreement does not deal with the reserve system. The parties have differing views as to the legality and as to the merits of such system as presently constituted. This Agreement shall in no way prejudice the position or legal rights of the parties or of any player regarding the reserve system.

It is agreed that until the final and unappealable adjudication (or voluntary discontinuance) of *Flood* v. *Kuhn et al.*, now pending in the federal district court of the Southern District of New York, neither of the parties will resort to any form of concerted action with respect to the issue of the reserve system, and there shall be no obligation to negotiate with respect to the reserve system. Upon the final and unappealable adjudication (or voluntary discontinuance) of *Flood* v. *Kuhn, et al.*, any party shall have the right to reopen negotiation on the issue of the reserve system as follows:

(a) in the event such adjudication (or discontinuance) occurs between October 15 in any year and January 15 in the following year, inclusive, any party may thereafter reopen such negotiation, upon 10 days' prior written notice, provided that such notice is given on or before January 15;

(b) in the event such adjudication (or discontinuance) occurs between January 16 and October 15, inclusive, in any year, either party may thereafter reopen such negotiation on or after November 1, upon 10 days' prior written notice, provided that such notice is given on or before January 15 in any following year.

ATTACHMENT "C"

Grievance Procedure

For the purpose of providing an orderly and expeditious procedure for the handling and resolving of certain grievances and complaints, as hereinafter provided, the following shall apply as the exclusive remedy of the parties.

A. Definitions.

As used herein the following terms shall have the meanings indicated:

1. (a) "Grievance" shall mean a complaint which involves the interpretation of, or compliance with, the provisions of any agreement between the Players Association and the 24 Clubs or any of them, or any agreement between a Player and a Club, except that disputes relating to the following agreements between the Players Association and the 24 Clubs shall not be subject to the grievance procedure set forth herein:

(i) The Major League Baseball Players Benefit Plan, as amended April 1, 1969.

(ii) The Agreement Re Major League Baseball Players Benefit Plan, dated February 25, 1969.

(iii) The Agreement, dated December 1, 1966 regarding dues check-off.

Any procedures or remedies available to the parties for the resolution of disputes arising under said agreements which were available as of their respective execution dates, shall continue to be available and shall not be altered or abridged in any way as a result of the Basic Agreement between the Players Association and the 24 Clubs, dated , 1970.

(b) Notwithstanding the definition of "Grievance" set forth in subparagraph (a) above, "Grievance" shall not mean a complaint which involves action taken with respect to a Player or Players by the Commissioner involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball. Within 30 days of the date of the action taken, such complaint shall be presented to the Commissioner who promptly shall conduct a hearing in accordance with the Rules of Procedure attached hereto as Appendix A. The Commissioner shall render a written decision as soon as practicable following the conclusion of such hearing. The Commissioner's decision shall constitute full, final and complete disposition of such complaint, and shall have the same effect as a Grievance decision of the Arbitration Panel.

In the event a matter filed as a Grievance in accordance with the procedure hereinafter provided in Section B gives rise to issues involving the integrity of, or public confidence in, the game of baseball, the Commissioner may, at any stage of its processing, order that the matter be withdrawn from such procedure and thereafter be processed in accordance with the procedure provided above in this subparagraph (b). The order of the Commissioner withdrawing such matter shall consfitute a final determination of the procedure to be followed for the exclusive and complete disposition of such matter, and such order shall have the same effect as a Grievance decision of the Arbitration Panel.

After November 1, 1971, either party may reopen the Basic Agreement, with reference solely to this Sec. A-1(b) and Sec. C-2 of this Grievance Procedure, upon the giving of 10 days written notice

prior to December 31, 1971. Thereafter, the parties shall have an obligation to negotiate and each shall have the right to take concerted action in support of its position.

(c) Notwithstanding the definition of "Grievance" set forth in subparagraph (a) above, "Grievance" shall not mean a complaint or dispute which involves the interpreation or application of, or compliance with the provisions of the first sentence of paragraph 3(c) of the Uniform Player's Contract. However, nothing herein shal alter or abridge the rights of the parties, or any of them, to resort to a court of law for the resolution of such complaint or dispute.

2. "League" shall mean the American League of Professional Baseball Clubs or the National League of Professional Baseball Clubs.

3. "Commissioner" shall mean the person holding the office of Commissioner of Baseball as defined in the Major League Agreement.

4. "Player" or "Players" shall mean a Player or Players on the active roster of a Major League Club or on a disabled, restricted, disqualified, ineligible, suspended or military list of a Major League Club. The term "Player" shall also include a former Player or Players who have a Grievance or complaint arising by reason of their former status as a Player as defined in the preceding sentence.

5. "Club" or "Clubs" shall mean a Club or Clubs with membership in a League.

6. "Players Association" shall mean the Major League Baseball Players Association.

7. "Player Relations Committee" shall mean the Player Relations Committee established by the 24 Clubs.

8. "Party" shall mean a Player, Club, League or the Players Association.

9. "Grievant" shall mean a Party who initiates or appeals a Grievance.

10. "Arbitration Panel" shall mean the tripartite panel of arbitrators empowered to decide Grievances appealed to Arbitration. One arbitrator shall be appointed by the Players Association, one arbitrator shall be appointed by the Clubs and the impartial arbitrator, who shall serve as the Chairman of the Panel, shall be appointed by agreement of the two party arbitrators. In the event the party arbitrators are unable to agree upon the appointment of the impartial arbitrator by , 1970, they jointly shall request that the American Arbitration Association furnish them a list of prominent, professional arbitrators. Upon receipt of said list, the party arbitrators shall alternate in striking names from the list until only one remains. The arbitrator whose name remains shall be deemed appointed as the impartial arbitrator.

Following any decision of the Arbitration Panel, either of the party arbitrators may discharge the impartial arbitrator by serving written notice upon him and the other party arbitrator. Within 30 days thereafter, the party arbitrators shall either agree upon a successor impartial arbitrator or select a successor from an American Arbitration Association list, as set forth above.

Decisions of the Arbitration Panel shall be made by majority vote.

B. Procedure.

Step 1. Any player who believes that he has a justifiable Grievance shall first discuss the matter with a representative of his Club designated to handle such matters, in an attempt to settle it. If the matter is not resolved as a result of such discussions, a written notice of the

Grievance shall be presented to the Club's designated representative, provided, however, that for a Grievance to be considered beyond Step 1, such written notice shall be presented within (a) 45 days from the date of the occurrence upon which the Grievance is based, or (b) 45 days from the date on which the facts of the matter became known or reasonably should have become known to the Player, whichever is later. Within 10 days following receipt of such written notice, the Club's designated representative shall advise the Player in writing of his decision and shall furnish a copy to the Players Association. If the decision of the Club is not appealed further within 15 days of its receipt, the Grievance shall be considered settled on the basis of that decision and shall not be eligible for further appeal.

Step 2. A Grievance, to be considered in Step 2 shall be appealed in writing by the Grievant or by the Players Association to a designated representative of the Player Relations Committee within 15 days following receipt of the Club's written decision. The Grievance shall be discussed within 10 days thereafter between representatives of the Player Relations Committee and representatives of the Players Association in an attempt to settle it. Within 10 days following such discussion, the designated representative of the Player Relations Committee shall advise the Grievant in writing of his decision and shall furnish a copy to the Players Association. If the decision of the Player Relations Committee representative is not appealed further within 15 days of its receipt, the Grievance shall be considered settled on the basis of that decision and shall not be eligible for further appeal.

Grievances which involve (a) more than one Club, or (b) a Player who is not under contract to a Club which is party to the Grievance, may be filed initially in Step 2, provided that written notice of the Grievance shall be presented to the designated representative of the Player Relations Committee within (a) 30 days from the date

of the occurrence upon which the Grievance is based, or (b) 30 days from the date on which the facts of the matter became known or reasonably should have become known to the Player, whichever is later.

Step 3. In order for a Grievance to be considered further, it shall be appealed in writing by the Grievant or by the Players Association, within 15 days of receipt of the Step 2 decision, to the president of the Club's League, for his consideration. Upon receipt of the notice of appeal, the president of the League shall designate a time and place for an informal hearing, which hearing shall be commenced as soon as practicable but no later than 20 days from the date of receipt of the appeal. The League president shall render a written decision within 10 days following the conclusion of such hearing, and may affirm, modify or reverse the decision appealed from. If the decision of the League president is not appealed further within 15 days of its receipt, the Grievance shall be considered settled on the basis of that decision and shall not be eligible for further appeal.

The Parties may, by mutual consent, waive the necessity of the Step 3 procedure and permit the appeal of a Grievance from Step 2 directly to Arbitration.

Grievances which relate to League disciplinary action and which are not covered by the procedure set forth in Section C, below, may be filed initially in Step 3, provided that written notice of the Grievance shall be presented to the League president within 30 days following the date on which the Player receives written notification of the discipline.

Arbitration. Within 15 days following receipt of the decision of the League president (or, in the event the Parties have agreed to waive the Step 3 procedure, within 15 days following receipt of the Step 2 decision), the Grievant or the Players Association may appeal the Grievance in writing to the Chairman of the Arbitration

Panel for impartial arbitration. Upon receipt of the notice of appeal, the Chairman of the Arbitration Panel shall set a time, date and place for hearing the appeal, which hearing shall be commenced as soon as practicable but no later than 20 days following receipt of the notice of appeal. Such hearing shall be conducted in accordance with the Rules of Procedure attached hereto as Appendix A. The Arbitration Panel shall render a written decision as soon as practicable following the conclusion of such hearing, and may affirm, modify or reverse the decision appealed from. The decision of the Arbitration Panel shall constitute full, final and complete disposition of the Grievance appealed to it.

With regard to the arbitration of Grievances, the Arbitration Panel shall have jurisdiction and authority only to interpret, apply or determine compliance with the provisions of agreements between the Players Association and the 24 Clubs or any of them, and agreements between individual Players and Clubs. The Arbitration Panel shall not have jurisdiction or authority to add to, detract from, or alter in any way the provisions of such agreements.

All costs of arbitration, including the fees and expenses of the impartial arbitrator, shall be borne equally by the parties, providing that each of the parties shall bear the cost of its or their own party arbitrator, witnesses, counsel and the like.

C. Special Procedure with Regard to Certain Disciplinary Action.

Complaints involving a fine or suspension imposed upon a Player by a League or by the Commissioner for conduct on the playing field or in the ball park shall be subject exclusively to this Section C, as follows:

1. Any Player who believes that he has a justifiable complaint regarding such discipline may, within 30 days of his receipt of written notification of the

discipline, appeal in writing to the League president, if the discipline was imposed by him, or to the Commissioner, if the discipline was imposed by him, for a hearing. Upon receipt of the notice of appeal, the League president or Commissioner, as the case may be, shall designate a time and place for hearing the appeal, which hearing shall be commenced within 10 days from the date of receipt of the appeal. Such hearing shall be conducted in accordance with the Rules of Procedure attached hereto as Appendix A. The League president or Commissioner, as the case may be, shall render a written decision as soon as practicable following the conclusion of such hearing, and may affirm, modify or revoke the disciplinary action originally imposed. The decision of the League president or Commissioner, as the case may be, shall constitute full, final and complete disposition of the complaint and shall have the same effect as a Grievance decision of the Arbitration Panel.

2. Notwithstanding the provisions of paragraph 1 above, if any such discipline imposed upon a Player by a League involves a fine in an amount which exceeds $500 or a suspension exceeding 10 days, a complaint relating thereto shall be appealed from the decision of the League president to the Commissioner for determination in the same manner and with the same effect as provided in subparagraph 1(b) of Section A.

Grievances Initiated or Appealed by a Club.

1. Any Club which believes it has a justifiable Grievance, as defined in Section A-1 hereof and not limited by the following three subparagraphs of this Section D, shall present such Grievance in Step 2, Section B within (a) 30 days from the date of occurrence on which the Grievance is based, or (b) 30 days from the date on which the facts of the matter became known or reasonably should have been known to the

Club, whichever is later, and such Grievance shall be processed in accordance with the provisions of Step 2, Step 3 and "Arbitration" as provided in Section B, provided, however, that a Club may not appeal a decision in Step 2 or Step 3 with respect to a Grievance covered by this paragraph.

2. A Club and a Player may jointly appeal to the president of its League from the decision of the representative of the Player Relations Committee in a Step 2 proceeding as provided for in this Grievance Procedure.

Nothing contained in this paragraph shall be deemed to limit or impair the right of any Club to impose discipline upon a Player or Players or to take any other action not inconsistent with the Uniform Player's Contract or any agreement with the Players Association to which the Club is a party.

E. Grievances Initiated or Appealed by the Players Association.

1. The Players Association may on its own motion appeal Grievances or complaints on behalf of a Player or Players as provided in this Grievance Procedure, except that the Players Association will not appeal a Grievance or complaint involving player discipline without the approval of the Player or Players concerned.

2. The Players Association may on its own motion initiate Grievances *or complaints* on behalf of a Player or Players on all matters *not* involving player discipline. Nothing herein shall interfere with the right of a Player who initiates a disciplinary Grievance *or complaint* to be represented by the Players Association at any Step of the Grievance Procedure.

F. Miscellaneous.

1. Each of the time limits set forth herein may be extended by mutual agreement of the Parties involved.

2. If any Grievance is not processed in accordance with the prescribed time limits in any Step, unless an extension of time has been mutually agreed upon, either Party, after notifying the other Party of its intent in writing, may appeal to the next Step.

3. Any decision which is appealable under this Grievance Procedure but which is not appealed within the time allowed or within any time mutually agreed upon by the Parties shall constitute a full, final and complete disposition of the Grievance involved.

4. In any discussion or hearing provided for in the Grievance Procedure, a Player may be accompanied by a representative of the Players Association who may participate in such discussion or hearing and represent the Player. In any such discussion or hearing, any other Party may be accompanied by a representative who may participate in such discussion or hearing and represent such Party.

5. The Parties recognize that a Player may be subjected to disciplinary action for just cause by his Club, League or the Commissioner. Therefore, in Grievances regarding discipline, the issue to be resolved shall be whether there has been just cause for the penalty imposed.

6. Nothing contained in this Grievance Procedure shall excuse a Player from prompt compliance with any discipline imposed upon him. If discipline imposed upon a Player is determined to be improper by reason of a final decision under this Grievance Procedure, the Player shall promptly be made whole.

RULES OF PROCEDURE

Grievance Arbitration Hearings Before The Arbitration Panel

1. Granting of Hearings.

Hearings will be granted in all cases properly appealed to the Arbitration Panel unless the Parties by mutual agreement request a finding of facts and a decision based upon briefs submitted.

2. Attendance at Hearings.

Persons having a direct interest in the arbitration are entitled to attend hearings. The Arbitration Panel shall have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the Arbitration Panel to determine the propriety of the attendance of any other persons.

3. Conduct of Hearings.

Hearings will be conducted in an informal manner. The arbitration hearing shall be regarded as a cooperative endeavor to review and secure the facts which will enable the Arbitration Panel to make just decisions. The procedure to be followed in the hearing will be in conformity with this intent.

4. Representation of Parties.

A Player or Players may be accompanied by a representative of the Players Association who may participate in the hearing and represent the Player or Players. Any other Party may be accompanied by a representative who may participate in the hearing and represent such Party.

5. Adjournments.

The Arbitration Panel for good cause shown may adjourn the hearing upon the request of a Party or upon its own initiative, and shall adjourn when all the Parties agree

thereto, provided that no adjournment hereunder shall exceed 10 days unless all Parties so agree.

6. Order of Proceedings.

The Arbitration Panel may, in its discretion, vary the normal procedure under which the initiating Party first presents his claim, but in any case shall afford full and equal opportunity to all Parties for presentation of relevant proofs.

7. Arbitration in the Absence of a Party.

The arbitration may proceed in the absence of any Party who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a Party. The Arbitration Panel shall require the other Party to submit such evidence as he may require for the making of an award.

8. Evidence.

The Parties may offer such evidence as they desire and shall produce such additional evidence as the Chairman of the Arbitration Panel may deem necessary to an understanding and determination of the dispute. The Chairman of the Arbitration Panel shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Parties except where any of the Parties is absent in default or has waived his right to be present.

9. Testimony.

All testimony shall be taken under oath or by affirmation. All witnesses whose testimony shall be introduced as evidence at the hearing shall be made available for cross-examination by the other Party. The Arbitration Panel may receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as it deems proper after consideration of any objections made to its admission.

10. Stenographic Record.

The Arbitration Panel will make the necessary arrangements for the taking of an official stenographic record of the testimony whenever such a record is deemed necessary by it or it is requested by either Party. The cost of such record shall be borne equally by the Parties, unless, at the opening of the hearing, both the Chairman of the Arbitration Panel and the other Party indicate their desire not to receive a copy of the transcribed record, in which case the entire cost shall be borne by the requested Party.

11. Closing of Hearings.

The Chairman of the Arbitration Panel shall inquire of all Parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Chairman of the Arbitration Panel shall declare the hearings closed and a minute thereof shall be recorded. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final filing date set by the Chairman of the Arbitration Panel.

12. Reopening of Hearings.

At any time before the award is made the hearings may be reopened by the Arbitration Panel on its own motion, or on the motion of either party for good cause shown.

13. Issuance of Decision.

Two signed copies of the Arbitration Panel's written decision will be provided to each Party.

14. Settlement by the Parties.

When cases appealed to the Arbitration Panel are thereafter settled by agreement between the Parties, either prior to or after the arbitration hearing, the Arbitration Panel shall be so notified promptly by the Party which appealed the case. The Arbitration Panel shall thereupon treat the case as closed, and shall have no obligation to render a decision or further process the Grievance.

15. Expenses.

The expenses of witnesses for either side shall be paid by the Party producing such witnesses.

16. Communication with the Chairman of the Arbitration Panel.

Copies of all written communications sent by a Party to the Chairman of the Arbitration Panel in connection with arbitration cases shall immediately be made available to the other Party. There shall be no oral communication by a Party with the Chairman of the Arbitration Panel in connection with arbitration cases unless the other Party or his representative is present.

17. Commissioner and Section C Hearings.

These Rules of Procedure shall also apply to hearings conducted by the Commissioner pursuant to Section A, subparagraph 1(b), or by the Commissioner or a League president pursuant to Section C of the Grievance Procedure.

April 23, 1970

Mr. John J. Gaherin
60 East 42 Street
New York, New York 10017

Dear John:

The third paragraph of Section A-1-(b) of the Grievance Procedure provides for a reopener with respect to the provisions of Section A-1-(b) and Section C-2 of the Grievance Procedure under the terms set forth in said third paragraph. This letter will express the mutual understandings of the parties as to the application and interpretation of said third paragraph during the term of the Basic Agreement, as follows:

1. Notwithstanding the generality of said third paragraph, neither party will give notice of a reopening

unless one or more complaints have been processed to a conclusion under Section A-1-(b) or Section C-2 during the term of the Agreement but prior to November 1, 1971.

2. Even assuming the completed processing of a complaint under paragraph 1. above, neither party will give notice of a reopening predicated upon the contention that any matters which were processed under Part B of the Grievance Procedure should have been processed as complaints under Section A-1-(b) or Section C-2 thereof.

If the foregoing conforms to your understanding, please so indicate by signing in the space provided below.

Sincerely,

MARVIN J. MILLER

AGREED TO:

By .....

Clubs' Proposal
May 1, 1970

Mr. Marvin J. Miller

Dear Mr. Miller:

This letter expresses the mutual understanding of the parties to the Basic Agreement dated ..... that anything in the Grievance Procedure provided for in the Basic Agreement to the contrary notwithstanding, complaints or disputes as to any rights of the players or the clubs with respect to the sale or proceeds of sale of radio or television broadcasting rights to any baseball games by any kind or method of transmission, dissemination or reception shall not be subject to said Grievance Procedure. However, nothing herein or in the Grievance Procedure

shall alter or abridge the rights of the parties, or any of them, to resort to a court of law for the resolution of such complaint or dispute.

The reference herein to the above types of complaints or disputes shall not be deemed to define exclusively the types of complaints or disputes which are not subject to said Grievance Procedure.

If the foregoing conforms to your understanding, please so indicate by signing in the space provided below.

Sincerely,

JOHN J. CAHERIN

ACCEPTED:

ATTACHMENT "D"

Tentatively Agreed Upon as Revised 1/21/70.

BASIC AGREEMENT—ARTICLE VII RULE CHANGES

If during the term of this Agreement any Major League rule, Professional Baseball rule or regulation of the American or National Leagues is proposed to be changed, the Clubs agree that they shall give the Players Association notice thereof, and shall negotiate the proposed change with the Players Association, provided that this Article VII shall apply only to (a) a change in a player benefit under an existing rule or regulation and (b) the adoption of a rule or regulation which would change a player benefit under an existing rule or regulation or impose an obligation upon the players which had not previously existed. Except as specifically provided in this Article VII, the right of the Clubs to make any rule change whatsoever shall not be impaired or limited in any way, provided that the Clubs shall not make any change which is inconsistent with the provisions of any then existing agreement between the 24 Clubs and the Players Association.

UNIFORM PLAYER'S CONTRACT PARAGRAPH 9(a)

9. (a) The Club and the Player agree to accept, abide by and comply with all provisions of the Major League Agreement, the Major League Rules, the Rules or Regulations of the League of which the Club is a member, and the Professional Baseball Rules, as the same are in effect on the date of this Uniform Player's Contract and as the same may be supplemented, modified or repealed pursuant to the provisions of any agreement between the 24 Clubs and the Major League Baseball Players Association, provided that the Club, together with the other Clubs of the American and National Leagues and the National Association, reserves the right to modify, supplement or repeal any provision of said Agreement, Rules and/or Regulations in a manner not inconsistent with the provisions of any then existing agreement between the 24 Clubs and the Major League Baseball Players Association.

ATTACHMENT "E"

Tentatively Agreed as of January 8, 1970

RECOGNITION

The Clubs recognize the Association as the sole and exclusive collective bargaining agency for all major league players, and individuals who may become major league players during the term of this Agreement, with regard to all terms and conditions of employment except (1) individual salaries over and above the minimum requirements established by this Agreement and (2) Special Covenants to be included in individual Uniform Player's Contracts, which actually or potentially provide additional benefits to the player.

ATTACHMENT "F"

Uniform Player's Contract—Regulation 2

1. Insert, immediately prior to last sentence, the following new sentence:

> "Failure to give such notice shall not impair the rights of the Player, as herein set forth, if the Club has actual knowledge of such injury."

(Note: This is consistent with present practice [see, e.g., position of the Philadelphia Club in the *Ramos* arbitration case] and is the precise language presently included in the National Association Uniform Player Contracts.)

2. Delete reference to deductibility of workmen's compensation payments, and add, as a new regulation, the following:

> "All workmen's compensation payments received by the Player as compensation for loss of income for a specific period during which the Club is paying him in full, shall be paid over by the Player to the Club."

(Note: The present contract provides that *all* compensation payments, regardless of the nature of the award or the period for which compensation is payable, are to be paid over to the Club *if* the injury was sustained in the course and within the scope of employment under the contract. The present provision is *inequitable to the player* in that it ignores the purpose of particular WC payments. It is *inequitable to the Club* in that a player may be receiving WC as a result of an injury, *not* sustained in the course and within the scope of his employment under the contract, for a specific period during which the club is paying his salary, and the club has no right to recover.

The present National Association player contract is quite favorable to the player in that it resolves the inequity to him, but does not cure the inequity to the club.

This proposal is intended to correct both inequities. It does away with the importance of when and under what circumstances the injury was sustained, and treats only with the questions of whether the WC payments, by the nature of the award, are attributable to a specific period of time and whether the club is paying the player's salary during all or any part that time.)

[Def. Feeney et al.'s Ex. O]

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

STATEMENT OF POLICY

July 28, 1967

The Executive Board of the Major League Baseball Players Association has adopted the following policy statement, to be used as a guide in the forthcoming negotiations with the Major League Clubs.

Introduction

Although many advances have been made in the past twenty-one years to improve the physical and economic conditions of major league players, coaches, managers and trainers, much remains to be accomplished. Baseball now flourishes in an unprecedented manner, but while our members have made progress, their strides seem far less impressive when compared to the soaring prosperity of the Major League Club owners.

Recently, the Players Association negotiated substantial improvements in the Benefit Plan, virtually doubling the pension benefits and greatly improving the insurance benefits provided thereunder. These improvements were made

possible by negotiating an increase in the Clubs' contributions from approximately 2.5 million dollars to 4.1 million dollars per year. However, the 4.1 million dollar figure was arrived at, as had been the prior figure, by reference to 60 percent of the television and radio income from the World Series and 95 percent of the total proceeds of the All-Star Game. Therefore, because of a more lucrative broadcasting contract, the Clubs were able to increase substantially their contributions to the Benefit Plan and, at the same time, realize more than $1,000,000 of additional income a year from that source.

While the members of the Players Association have been able to secure a reasonable share of this one source of revenue, they have not shared appropriately in the more substantial areas. Looking only at television and radio income, the Clubs received this year, in addition to the World Series and All-Star Game amounts, over 23 million dollars in revenue before a single fan passed through a turnstile. The Clubs' total share of television and radio income presently more than doubles the entire payroll for all major league players, coaches, managers and trainers. As recently as 1950, such income was less than half of the payroll paid in that year. In addition, new attendance records are being set each year, ticket prices have risen, and the Clubs' revenues from concessions have mushroomed.

Against this background, it is difficult to be modest in making proposals. Nevertheless, the Players Association, in this statement of negotiating policy, has considered only those matters in most immediate need of revision and improvement. We are presently engaged in negotiations on the subject of minimum salary for players, and look for an appropriate resolution of this problem in the immediate future. In addition, the following matters must be considered.

Uniform Players Contract

The maximum amount by which a player's salary may be reduced should be 10 percent of the previous year's salary, and the rule should apply also if a player who previously had a major league contract is tendered a minor league contract. If a player's contract is terminated by a Club after the first 30 days of the championship season, he should receive payment for the remainder of the term of the contract, provided there is no duplication of payment by another Club. If a contract is terminated during the first 30 days of the season, the player should receive an additional 30 days payment thereunder, together with his reasonable traveling expenses to his home.

All Baseball rules and regulations which shall be binding upon the players, should be set forth in the uniform players contract. The contract should provide specific authorization and encouragement of deferred income methods of payment, at the request of the player. The player should be able to choose between having his salary paid over the playing season or over the entire year. Salary checks should not be delayed due to a Club being on the road.

If the Benefit Plan is terminated by the Clubs for any reason, all player contracts then in effect should be subject to renegotiation at the option of the player.

Further revisions and amendments should be made in the uniform players contract to bring it into conformity with all agreements and understandings reached between the Players Association and the 20 Major League Clubs.

In addition, uniform contracts for coaches and trainers should provide for a $12,000 minimum salary.

Expense Allowances

The Meal Money Allowance payable during the championship season should be increased to $15 per day and should be paid to all players on the roster for each day a

Club is on the road and for all traveling days. The daily Spring Training Allowance for players who live away from the Club's headquarters should be increased to $12 for meals and $8 for lodging. Players who have had at least 60 days Major League service should be permitted, as of right, to live away from the Club's spring training headquarters with their families. The Spring Training Allowance for incidentals has remained frozen for 21 years. This allowance, commonly known as Murphy Money, should be raised to $45 to reflect the rise in the cost of living since it was instituted.

Moving expenses should be payable for all moves resulting from assignment of contract, whether within a championship season or outside the season and whether between Major League Clubs or between a Major League Club and a Minor League Club. With regard to assignments between Major League Clubs, the allowance rates currently in effect should be continued. With regard to assignments between a Major League Club and a Minor League Club, the allowance should be payable in accordance with the following schedule of rates:

Miles Between Club Cities	*Amount of Allowance*
50-299	$ 300
300-999	600
1,000-1,999	900
2,000 or more	1200

If a contract is assigned during the off-season, the player should receive a moving expense allowance only if he changes his residence as a result of the assignment. If a contract is assigned during the playing seasons the player should also be reimbursed for up to two months rental payment for living quarters in the city of the assignor Club for which he is legally obligated after the date of such assignment and for which he is not otherwise reimbursed.

Procedure for Resolving Disputes

Any player, coach, manager or trainer who believes that he has a justifiable request or complaint which involves the interpretation or application of, or compliance with, the provisions of any agreement between the Players Association and the 20 Clubs or any agreement between the individual and a Club, should discuss the request or complaint with a designated representative of his Club in an attempt to settle it. This procedure, if followed in good faith by all concerned, should lead to a fair and speedy solution of most complaints. However, in the event the matter is not resolved at the Club level, it should be appealable to the Players Association and the Player Relations Committee for discussion and resolution. Failing such resolution, the matter should be referred to an impartial arbitrator, to be selected jointly by the parties, for binding decision. The Players Association should refer to arbitration only such cases it believes to be meritorious.

The imposition of discipline or fines should be subject to the foregoing procedure. In such case, the issue to be resolved should be whether there has been just cause for the discipline or penalty imposed.

In proposing a meaningful Disputes Procedure, it is not the purpose of the Players Association to interfere with the exclusive rights of the Clubs to manage their operations and direct their employees. Rather, it is our purpose to establish an orderly system for *resolving* disputes which might otherwise interfere with the preservation of a wholesome and mutually respectful relationship.

Scheduling

The Players Association recognizes the desirability of scheduling the championship season in such a way as to produce the greatset fan interest and attendance. However, some scheduling practices have the effect of increasing the risk of injury and illness to the players, shortening

their careers and lowering the quality of the game. It is our opinion that the following rules must be instituted to achieve an appropriate accommodation to all the interests involved:

1. Day doubleheaders should not be scheduled or rescheduled following a night game.
2. Split doubleheaders should not be scheduled or rescheduled.
3. Twi-night doubleheaders should not be scheduled or rescheduled preceding a day game.
4. Night games should not be scheduled or rescheduled on getaway dates if either Club has a day game the following day in another city.
5. All games starting later than 4 P.M. should be considered night games.
6. Low temperatures and high winds should be given more recognition in determining whether a game should be postponed, and minimum standards should be adopted.
7. A day off should be scheduled for Clubs traveling between cities in the Eastern Zone and cities in the Western Zone.
8. No one-day stands should be scheduled.
9. No games should be scheduled or rescheduled during the three-day All-Star Game break.

Preliminary schedules for the following season should be made available to the Association at least one week prior to the start of the World Series. The parties should meet with the League Schedulers during the World Series to review the preliminary schedules.

Finally, the problem of the length of the championship season is a subject which should be carefully reviewed.

The Players Association believes that a joint study committee should be established, consisting of representatives of the Association and representatives of the Clubs, to review and discuss the merits and disadvantages of shortening the playing season. While the parties presently hold different views as to how the best interests of Baseball may be served with regard to this subject, the most intelligent and constructive way to deal with the matter is to meet together, exchange facts, ideas and suggestions, and arrive at a reasoned and appropriate solution.

Television Contracts

Because of the joint interests and rights of the parties with regard to the telecasting of baseball games, the Players Association is entitled to representation in the negotiating of television contracts. We believe that a joint, cooperative effort will provide the most advantageous television arrangements and will serve the best interests of the members of the Players Association, the Clubs and Baseball.

Reserve Clause

The present uniform players contract provision, under which a Club asserts the right to renew the contract without the player's agreement and to determine unilaterally the salary to be paid (subject only to a limitation on the amount of a cut), requires a review.

The impact of this provision is to deprive the player of bona fide bargaining power in his salary "negotiations" with a club. In addition to placing the player in the untenable position of being required to accept the Club's proposed salary or leaving organized baseball, the reserve clause is of doubtful legality.

The solution to this problem lies neither in a sudden elimination of the reserve clause, whether by judicial decree or otherwise, nor in the preservation of the status quo. We find no validity in the calamitous predictions that chaos will result from any change whatsoever. Rather, the solu-

tion lies in a reasoned, open-minded approach which seeks an accommodation in the interest of fairness for the player in his salary negotiations and of the growth and prosperity of Baseball as a whole.

Miscellaneous

The following matters also require immediate attention:

1. Players, managers, coaches and trainers should be paid $150 for each exhibition game in which they are required to participate in a Major League city, except those in which all net proceeds go to charitable causes.

2. Salaries should be continued for those who are required to attend a summer encampment of the Reserve of the Armed Forces or the National Guard.

3. First class air travel and first class hotel accommodations should be provided for all road trips, whenever possible.

4. All required clothing and uniforms, exclusive of shoes, should be provided by the Clubs without cost or deposit.

5. Appropriate parking facilities should be provided by the Clubs for the use of players, managers, coaches and trainers at the ball parks on game or practice days, without cost.

6. The College Scholarship Plan should be made available as a right, not merely at the discretion of a Club.

There are several areas where cooperative ventures between the Players Association and the Clubs are called for and would be mutually advantageous. The players' proprietory rights to their pictures and names and the Clubs' rights to their insignia and emblems together constitute a valuable property which easily can be marketed. Baseball

has lagged far behind other sports in this area, and the trend should be reversed. The Association and the Clubs should be working closely together in this field of activity, not only because it would provide additional revenue to Association members and the Clubs, but also because it would enhance fan interest and the future prosperity of Baseball.

Another area in which the parties should wage a joint effort relates to the exploitation of young ballplayers. Several companies engage in the practice of signing players, at the time they come into organized baseball, to long-term endorsement arrangements for which the players are given only token compensation. By the time most players reach the Major Leagues, they find they have virtually given away valuable property rights which should be a source of additional income. Such practices make cynics of fine athletes and tend to cheapen the game. Young players, at the time they sign their first contracts, should be advised and warned with regard to these practices. Both the Association and the Clubs have a responsibility to do all within their power to end the present exploitation of players, and to prevent such practices from occurring in the future.

Finally, the parties should use their best joint efforts for keeping up fan interest and enthusiasm for Baseball. The players have much to offer, for no one knows the game better than those who play it everyday. If, for example, there is some validity to the common complaint that the game should be speeded up, the resources and expertise of the players can be tapped for advice. Ideas for improving the game must not be regarded as acts of disloyalty. They should be aired and considered, and the players stand ready to play a role in this process.

Conclusion

The Players Association is hereby authorized to present this Statement of Policy to the appropriate representatives of the 20 Major League Clubs for the purpose of commenc-

ing negotiations. The Association, further, is authorized to present a proposal with regard to procedure for negotiations, bearing in mind the importance of achieving resolution of these matters at or before the Winter Baseball Meetings of 1967.

All agreements reached, together with agreements and understandings presently in effect and to be continued, should be incorporated into one document, copies of which are to be made available to each member of the Players Association. Such document, together with the Benefit Plan, shall supplement the individual salary agreements with the Clubs.

[Def. Feeney et al.'s Ex. P]

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION
375 Park Avenue
New York, N. Y. 10022
(212) 752-0940

August 29, 1969

Mr. John J. Gaherin
Player Relations Committee—
Major Leagues of Professional
Baseball Clubs
60 East 42nd Street
New York, New York 10017

Dear John:

In accordance with the provisions of Article X of the Basic Agreement dated February 19, 1968, the Players Association hereby gives notice of its desire to change the terms of the Agreement, effective as of January 1, 1970. The proposed changes are attached.

The Players Association reiterates its proposal contained in the July 21, 1969 Statement of Policy that the parties commence negotiations early in September, and that every

effort be made to conclude an Agreement by the close of the 1969 Championship Season.

Sincerely,

/s/ MARVIN
Marvin J. Miller

MJM:eb
Enclosure

[Def. Feeney et al.'s Ex. R]

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION
375 Park Avenue
New York, N. Y. 10022
(212) 752-0940

PROPOSED AMENDMENTS AND ADDITIONS TO BASIC AGREEMENT OF FEBRUARY 19, 1968

Length of Season

A Championship season consisting of a maximum of 154 games, League divisional playoffs of a maximum of 5 games, and a World Series of a maximum of 7 games.

Scheduling

Games to start not earlier than 1:00 P.M.

Day games to start not later than 2:30 P.M.

Earliest game starting time of 6:00 P.M. when either club has had a night game the prior night in another city.

If traveling more than one time-zone away following getaway day, then either (a) day game on getaway day or (b) off-day following night game on getaway day.

Western Zone to Eastern Zone travel to be followed by an off-day.

To the maximum extent practicable, off-days to be non-travel days.

No split doubleheaders.

No one-day stands or back-to-back series.

Reserve Clause and Related Rules

Replace with alternative provisions. Such provisions shall be:

1. legal and constitutional;
2. reasonably required to maintain the integrity of the game; and
3. responsive to the legitimate interest of the club owners with respect to their investment and equity in baseball franchises and, at the same time, shall provide the players with the normal rights of other people in a competitive, free enterprise economy.

World Series and Playoff Compensation

A single player pool consisting of:

a) 60% of the gate receipts of the first 4 games of the World Series (after 15% is paid to the Office of the Commissioner), and

b) 60% of the gate receipts of the first 3 games of each divisional playoff series and 60% of the radio-television revenue for such series.

Distribution of the player pool on the following basis:

World Series Winners	42%
World Series Losers	28%
Playoff Losers (2)	20%
Second Place Teams (4)	7½%
Third Place Teams (4)	2½%

Realistic minimum guarantees to be established for members of the clubs participating the World Series and divisional playoffs.

Minimum Salary

An appropriate increase in the minimum salary.

No Major League contract to provide for less than the minimum salary.

Reimbursement of Expenses

Appropriate increases in the following allowances:

Training Season

meals

housing (reasonable, actual cost)

other training season expenses

During Championship Season (and Playoffs and World Series)

meals and other expenses (on traveling days and on the road).

Moving Allowances

Increase present geographical scale to reflect

a) increased cost of moving family and household goods

b) "out-of-pocket" costs of moving which are not included in the present allowance.

Apply the scale to players whose contracts are assigned during the spring training season.

Reimburse players for all actual costs of moving when contracts are assigned in the off-season, and when contracts are assigned between Major and Minor League Clubs.

Termination Pay

If a club terminates a contract during the training season, payment of 60 days' pay to be made; if a club terminates a

contract during the playing season, full salary payment for the remainder of that contract.

In the case of a contract with a duration of more than one year, if terminated by the club at any time, full salary payment for the remainder of the contract term.

Grievance Procedure

Either party to have the right to appeal unresolved grievances to an impartial arbitrator selected by the parties.

Rules Changes

Institution of, or changes in a rule or regulation, which would reduce a player benefit or add a player obligation, to be made only by agreement of the parties.

Spring Training

Any player with a Major League contract who has had three or more years of Major League service and any married player whose wife is with him at the spring training base, may choose to live away from the club's headquarters.

Any player may choose to take his meals away from the club's headquarters and receive the standard meal allowance.

Other Sports

Clarification of rights and obligations.

Meetings

Players Association to have the right to hold one team meeting in each clubhouse during spring training provided at least 5 days' advance notice is given to the club involved; such meeting to be no longer than 90 minutes in duration starting with the normal reporting time of players on each club. The need for additional meetings or for meetings at other times will be accommodated to the fullest extent practicable.

Non-Discrimination

All provisions of the Agreement shall be applied without discrimination.

Individual Salary Negotiations

Each player, if he so desires, to have right to counsel or other representation of his choosing in individual salary negotiations.

Each player to have right of access to comparative salary information.

Maximum Salary Cut

The maximum amount by which a player's salary may be reduced to be 10% of previous year's salary.

Exhibition Games

Establish payment of $250 per game per player for every exhibition game played between Major League Clubs in a Major League City, provided all net proceeds do not go to charitable institutions.

Winter Leagues

No player to be required to play in Winter Leagues.

Eliminate salary maximum provided in rules.

Increase maximum liability of Winter League club in case of injury to player, to player's full salary for next championship season.

Other

Language changes (including, but not limited to, Preamble to the Agreement; Paragraphs 2 and 11 of Uniform Player's Contract; Regulation 2 of Uniform Player's contract).

Local problems involving clubhouse and field conditions.

[Def. Feeney et al.'s Ex. Q]

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION

Joint Study of the Reserve Clause

In connection with the Agreement of the club owners and the Players Association to complete by December 31, 1969 a joint study of possible alternatives to the reserve clause, two meetings of the parties have been held to date.

At those meetings in the latter part of April and May, the joint committee explored a variety of possible alternatives, including several possible modifications. At the conclusion of the most recent meeting it was agreed that, to explore the matter further, the Players Association, prior to the next meeting, would compile a sample list of problems which stem from or are made more severe by the present reserve clause and related rules. It is felt that an objective examination of such problems should further the purpose of the parties in the conduct of their joint study of possible alternatives to the reserve clause.

Freedom of Contract

Before particularizing player problems relating to the reserve rules, it is important to examine the over-all basic problem—the inability of the player to choose freely his employer in the first instance, combined with never having a voice in the bartering of his contract to other employers throughout his entire career. Denial of this right to the player, a right available in all other walks of life, is the root cause of a multitude of player problems. Such problems affect all players—the top stars of the game, as well as all others.

Non-Reciprocal Nature of Player's Contract

The reserve rules do not permit the player's contract to provide for mutual or reciprocal binding of player and club, but rather unilateral binding of player by the club. Under the contract, the player is bound to play exclusively for the club or for any other club to which the contract is assigned. Such assignments can occur at almost any time, without notice, through sale, trade, waivers, etc., at the

will of the owners involved. And the player's obligation is said by the owners to continue beyond the term of the contract, in fact throughout his entire career. But the contract does not bind the club to the player, not even during the term specified in the contract. Upon the signing of a contract, the club has a variety of options includng termination of the contract. If terminated in the off-season and prior to the training season, the club has no financial obligation. If terminated during the training season, the club's only financial obligation is to provide appropriate traveling expenses to the player's home. If terminated during the championship season the obligation of the club is limited to 30 days' pay and appropriate traveling expenses to the player's home. Only when termination is based on a work-connected disability does the club have an obligation to pay the player the salary contracted for, and then despite claims that the player's obligations continue beyond, only for the season in which the injury was sustained.

If a player performs above expectation, his salary is nevetheless fixed for the duration of the contract. But if he performs below expectation, or becomes ill or suffers an accident, the contract is non-binding and his security is limited to 30 days' pay.

Thus, despite the owners' allegation of the absolute nature of the binding commitment required of the player by his contract, the owner's commitment to the player is minimal and hedged in by numerous qualifications. In fact, the contract provides that under certain circumstances the owner's commitment to the player is nil.

Imbalance in Salary "Negotiations"

In every player salary "negotiation", management's interpretation of the reserve rules results in the following situation:

(a) The player may accept the salary offered, which can be any figure decided upon by management as long

as the salary offered does not represent more than a 20% cut below the salary stipulated for the prior year; or

(b) The player may leave his profession and terminate his career.

No means are provided for impartial resolution of honest differences between player and management regarding salary. No protection is provided the player against arbitrary imposition of an unfair salary by management. No test of a suggested salary in a free market is permitted.

Under such circumstances no bona fide negotiations can take place, and the salaries of all players have been and are affected disadvantageously as a result.

What now is termed "negotiation" is, in reality, a kind of ritual. The eventual salary of the player (within a very narrow range) is generally decided in advance by management. Thus, the limits of the "negotiations" are first determined. Within those narrow limits "flexibility" is sometimes permitted depending upon the personal relationship involved, the personality, attitude and degree of enlightenment of a general manager with respect to personnel relations, and other factors not closely related to the merits of a player's case for a particular salary. In short, the bargaining power of the player under the reserve rules is virtually non-existent.

The player-management "negotiating" situation is structured with additonal imbalances to the disadvantage of the player:

1. The player enters salary discussions with a minimum of pertinent facts available to him. The general manager or owner has available information concerning salary structures throughout baseball as well as numerous other facts concerning salary progressions, revenue and profit data of the club and related matters not available to the player.

2. Player-management salary discussions are limited by management fiat to, on the one hand, a player—most often relatively young and inexperienced in business affairs and contract negotiations—and, on the other hand, an experienced club official with considerable background in business matters and usually a veteran of many hundreds of contract negotiations.

Inequality of Opportunity

A player given sufficient opportunity to perform can demonstrate his ability. When ability is proven, it is generally rewarded, although often inadequately. But not all players are given equal opportunity to demonstrate their ability. Players have been and are retained by clubs for extended periods of time without such opportunity. A variety of circumstances give rise to such a practice which is made possible by the reserve rules. A player given only fleeting opportunities to play is retained because his club wants "insurance" against the possibility of injury to, or loss of skill by players used regularly; or because his club does not want another club to have him; or as trading material in years to come. Players in this position all too often are paid close to the minimum salary despite many years on a major league roster. In addition, players are often optioned to the minors, even though of major league calibre, because their clubs are strong at their positions.

Not all such players would become regulars if given an opportunity to contract with clubs in need of their services. But even in such instances it would be far better for a player to learn as early as possible that his future lies elsewhere, than to waste years of his life before being given an opportunity.

A club's desire to retain as much talent, potential talent and "insurance" as possible is understandable. But the impact of such decisions on individual players is harmful to their careers and, in some cases, a loss to the game itself.

Assignment of Contracts

A player's contract can be assigned to another club at almost any time at the will of the owner, without prior notice to, or consultation with the player. The contract can be assigned and reassigned many times, even within a season. A player who agrees to the terms of a contract to play for a club in one city the next year, subsequently can and does find that, after making necessary arrangements, he is to play for a different club in another city.

The difficulties, expenses and disruptions of family life so often caused by such assignments and re-assignments are largely ignored by management. Although a moving allowance is paid when a contract is assigned during the season, none is paid in the case of off-season assignments.* Other expenses caused by assignments of contracts, and the personal difficulties which are involved become the burden of the player and his family. Among others, these include: the many miscellaneous extra expenses of moving a family, rental payments under unterminated leases for which players are legally obligated, the need sometimes to sell a house and find another quickly, securing a mortgage in a tight money market, school readjustments for children of the family, termination of community ties, repeated dislocations of the family's social life, disruption of winter employment and other business arrangements relating to the player's preparation for a future livelihood.

Contract assignments clearly are an integral part of baseball. But the present rules and practices are insufficiently attuned to the fact that what is assigned is not just a piece of paper, but a human being. When it is said that a contract is sold by one club to another, it is a player who is being sold—for cash, for other players or for both.

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* Such unreimbursed expenses are magnified when a contract assignment occurs during the training season. For example, a player may report to Spring Training in Florida with his family, obtain housing, and two weeks later be assigned to a club training in Arizona.

Optional Assignments

The rules pertaining to optional assignments diminish the opportunity of players to play in the major leagues. While the experience and seasoning gained through assignment to a National Association club is important and necessary in many instances, the rules permit discretionary abuse by management. Repetitive optional assignments, when exercised solely for the convenience of a club, or for disciplinary reasons, or when alluded to as a means of intimidating or coercing players do not serve any purpose necessary to the game. The unduly restrictive definition of a "veteran" player permits assignment of an established Major League player to a National Association Club. Excessive optional assignments obviously reduce the length of a player's major league career, reduce his bargaining power and diminish his income.

Waiver Rules

The waiver rules are stated to be for the benefit of players, as well as the clubs. But, in practice, this is seldom the case. Although understandably difficult to document, there are frequent violations of the rule forbidding a club from soliciting another club, directly or indirectly, not to claim a player on waivers, or to withdraw a claim that has been made. "Gentlemen's Agreements" in connection with this rule are known to exist but the imposition of penalties by the Commissioner for violations, as provided by the rule, have been virtually non-existent. As a result of such agreements, players can be optioned to a minor league club, despite the waiver rules, even though his services could be utilized by a Major League club. The absence of claims when a waiver is offered is used frequently to "demonstrate" to a player that no other club wants him, but that is not always the case.

The rules permitting a club to request a waiver, receive a claim by another Major League club and then withdraw

the request for waiver, serve no legitimate purpose "for the benefit of the player", nor are they required for the preservation of the game.

Similarly, the requirement that there must be a waiver request when a club desires to release a player unconditionally does not serve the player's interest. Other mechanisms certainly can be devised to assist a released player in securing another Major League assignment, which are less damaging to his bargaining power.

Discipline and Coercion

The purpose of referring to undesirable characteristics of some management practices is not to imply that the owners or other officials of baseball clubs, as individuals, are less worthy than employers in other fields. It is, rather, to state the obvious: when an employment relationship is held together by compulsion, the power of the employer which is inherent in that situation inevitably results in certain abuses. The need to sign on the owners' terms or not play baseball is only the most apparent intolerable inequity stemming from the reserve rules. During last winter's negotiations just those coercive statements of baseball management which were quoted in the press ran the gamut from threats to withdraw proffered salary increases to warnings that specific players would be sent to the minors (despite their ability) if they did not report for a meeting before Spring Training even began. Equally unsubtle and equally illegal threats were made less publicly.

In this same general problem area it should be noted that there is widespread belief that coercion is exercised against some players when, in their role as elected player representatives, they attempt to represent faithfully the teammates who elected them. Repeated trades of effective player representatives and direct pressure on others has done little to dispel this belief, to say the least. At least two current general managers have asserted explicitly that

they have a right to influence the selection of a player representative by their players and, in fact, to intervene to bring about the replacement of one elected player representative by another!

Unilateral Adoption of Rules and Rule Changes

The Uniform Player's Contract, as revised by the Basic Agreement of February 19, 1968, prohibits rules changes inconsistent with the provisions of the Agreement. However, there are areas affecting players' conditions, and their very careers, in which the owners assert a unilateral right to change, modify or eliminate players' rights. These include such matters as the rules concerning waivers, contract assignments, optional agreements and many others which affect importantly the careers of players. Although protection of players' rights is often offered as justification, close examination of such rules and rules changes reveal that this is seldom the case.

Most of these rules and rules changes do not in any way serve the players' interests. A changed rule in the recent past prohibiting the re-signing of a player until May 15 by a club which released him after August 31 of the prior year results in narrowing the rights of even a player who is a free agent as the result of an unconditional release. A longer standing rule that prohibits the inclusion in a player's contract of a bonus provision based on the standing of his club at the end of the season is but another example of a rule, unilaterally adopted, which even cuts into the one area in which the player is alleged to have a voice: the matter of his compensation.

In addition to the unilateral adoption of rules and rules changes which affect players adversely, there are problems which stem from repetitive violations of the rules. Violation of agreements are not unknown in commerce and industry. But repetitive and flagrant violations are a rarity. When they occur, it is not unlikely that there is an underlying unbalanced employer-employee relationship.

In baseball, it is not illogical to conclude that the reserve rules, which produce that imbalance, are related directly to the problems of players in securing simple compliance with agreements and rules. The attitude of some representatives of baseball management with respect to agreements and rules, in order to be fully understood, must be viewed not only in the context of the reserve rules which eliminate the individual player's bargaining power, but also in the context of baseball's official position that management compliance with rules and agreements must be determined by management's own representatives. No approach is more calculated to produce contempt on the part of management with respect to the need to comply with agreements than this one. And none is more certain to be destructive of the goal of harmonious and constructive employer-employee relationships.

Summary

The foregoing obviously is not an exhaustive compilation of player problems. It does include some of the most serious problems (in the area of individual player's rights and bargaining power) which the Players Association believes are related to the existence of the present reserve clause and rules.

The Association urges that these problems be examined by the parties, jointly and objectively, in the framework of their joint study of possible alternatives to the reserve clause. It is felt that such examination can be instrumental in leading to solutions which preserve the integrity of the game, and which appropriately balance the needs and interests of the owners, the fans and general public, and the players.

The option clause, related clauses, and related rules and regulations should be revised to provide the following:

A. Any player may declare himself to be a Free Agent after each three-year period of service in Organized

Baseball. A year of service shall be credited if a player is included on the active roster of an Organized Baseball club during all or part of the championship season of such club, provided, however, that not more than one year of service shall be credited during one calendar year.

1. Any player who is eligible to do so may become a Free Agent by filing written notice to that effect with his last previous club during the 30-day period immediately following the close of the Major League championship season. At the end of said 30-day period, all such notices shall be published and distributed to each of the Major League clubs.

2. Should a player who is eligible to declare himself a Free Agent choose not to do so, he shall have the right again to declare himself a Free Agent during the 30-day period immediately following the next Major League championship season.

3. As to players who were active in Organized Baseball during or prior to 1969, their first opportunity to declare themselves Free Agents shall be as follows:

Years of Service in Organized Baseball	Season Following Which They May First Exercise Right
Less than 5	1972
5 but less than 10	1971
More than 10	1970

4. There shall be no negotiations or dealings respecting employment, either present or prospective, between any player and any club (other than the player's last previous club) unless the player has become a Free Agent or unless his last previous club shall have, in writing, expressly authorized

such negotiations or dealings prior to their commencement.

5. In the event a player declares himself a Free Agent and subsequently receives an acceptable employment offer from another club, he promptly shall give his last previous club a "right of first refusal" on the same terms and conditions as the offer, which right may be exercised within 10 days after notification by the player.

B. On or before November 15 in each year, each Major League Club shall transmit to the Commissioner and to its League President a list of not exceeding twenty (20) active and eligible players whom the club desires to reserve for the ensuing season. All players not so reserved shall be subject to the Winter Draft.

C. Should a player (who is not a Free Agent) and a club fail to reach agreement by February 15 on the amount of the player's salary for the ensuing season, either the player or the club may, at any time thereafter, refer the dispute to impartial arbitration for final resolution. In the event the dispute is referred to arbitration by the player, the club may, within 5 days of its receipt of notice of the referral, decline to submit to arbitration by causing the player to become a Free Agent and removing the player's name from its reserve list.

D. During the last two weeks of spring training and during the championship season, a major league player's contract shall not be assigned to another club without written approval of the player involved, provided, however, that nothing herein shall prevent a club from optionally assigning a contract to another club within its organization.

E. For purposes of the Major League Rules, the service qualifications for veteran status shall be reduced from 8 years to 5 years, and the number of major league options permitted for any player shall be limited to 3.

[Def. Feeney et al.'s Ex. S]

ECONOMIC ANALYSIS OF CERTAIN ASPECTS OF ORGANIZED BASEBALL

Salaries and Benefits

Average Salary—1965 and 1969

The average salary of players on rosters August, 1965 was $19,500. The comparable figure for 1969 was $24,957. This represents an increase of 27.9 percent over the four-year span. Over the same period the Bureau of Labor Statistics index of white collar salaries increased by 20 percent.

Average Salary—Established Players 1965-1969

Actually, the addition of first year men tends to obscure increases achieved by established players in year-to-year bargaining (particularly in an expansion year like 1969). We conducted a survey of the salary history of individual players comparing salaries paid in 1965 with salaries paid in 1969. Players who were on major league rosters for at least 60 days in each of the years 1965 through 1969, inclusive, were considered in the survey. Accordingly, 257 players were considered of 498 included on 1965 rosters. Aggregate salaries paid to these 257 players totaled $4,735,850 in 1965 and $9,206,500 in 1969. Thus, the average salary per player increased from $18,408 in 1965 to $35,823 in 1969, an increase of 94.1 percent over a four-year period. Only ten of the players in question had lower salaries in 1969 than in 1965.

We made a similar comparison for 209 players covering contracts signed and recorded at the time of our analysis. The increase in salaries for the 209 players amounted to 129.4 percent for the five-year period, or well over double. Apparently, established players have enjoyed substantial pay increases in recent years.

Comparison with Salaries of Other Occupations

Information on average annual salaries for employees in various industries or with specific occupations is given on the following page. Because of the interval in collecting some of the salary information, exact comparisons are not possible. It is clear that the salary level of baseball players on major league rosters compares favorably with incomes for the occupations listed.

Average salaries of players on rosters increased by a greater percentage than those of some of the occupations, and less than some of the occupations, notably that of lawyers which went up by nearly 50 percent over a period shortened by one year. Baseball salaries increased by a lesser percentage (27.9%) than that of contract construction workers (31.3%) over the 1965-1969 period, at about the same rate as salaries of public elementary and secondary school teachers (27.8%) and at a higher rate than mining salaries (25.2%) and manufacturing salaries (20.2%. Information on accountants is not exactly comparable (a year shorter) but the rate of increase seems in the same order of magnitude, i.e., 20% over three years as compared to 27.9% over four years for baseball salaries. On the basis of the salary information analyzed, the increase in baseball salaries over the period in question seems neither abnormally high or low.

The average salary of players on baseball rosters at the beginning of the 1970 season was $28,066. This represents a substantial increase over 1969, and an increase of 44% over average salaries five years earlier in 1965.

AVERAGE ANNUAL SALARIES FOR EMPLOYEES IN SPECIFIED INDUSTRIES OR OCCUPATIONS

	Percentage Increase 1965-1969	1969	1968	1967	1966	1965
Players on Major League Rosters (August)	27.9	24,957.00	24,667.00			19,500.00
Physicists			14,000.00		12,500.00	
Linguists			11,500.00		10,000.00	
Psychologists			13,200.00		11,500.00	
Economists			15,000.00		13,100.00	
Computer Sciences			14,100.00		NA	
Attorneys	49.6*	15,709.00	12,036.00		10,500.00	
Accountants	20.0*	9,900.00	9,276.00		8,232.00	
Draftsmen	17.2*	9,542.00	8,998.00		8,122.00	
Public Elementary and Secondary School Teachers	27.8	7,908.00	7,296.00	6,830.00	6,506.00	6,195.00
Total Manufacturing	20.2	6,734.52	6,266.52	5,974.80	5,841.68	5,591.56
Mining	25.2	8,045.52	7,438.60	7,066.28	6,772.48	6,423.04
Contract Construction	31.3	9,445.28	8,557.12	8,057.40	7,605.52	7,195.76
% of U. S. Households $15-25,000			8%	6.9%		
Over $25,000			2.9%	2.5%		

Sources: National Science Foundation
National Education Association, Research Division
Department of Labor—Bureau of Labor Statistics
National Survey of Professional, Administrative, Technical and Clerical Pay
Manufacturing Data
Bureau of Labor Statistics
Employment & Earnings and Monthly Report on the Labor Force

* 1966 to 1969.

Salary History and Pension Credits

Salary History

We surveyed the salary history to date and pension credits of 498 players on major league rosters as of the end of August, 1965 in order to obtain some perspective on length of careers, average salaries and pension credits.

The table on the following page summarizes our analysis of salaries and number of years covered. Of particular interest is the effect longevity of career has on average salaries, as, characteristically, salaries continue to increase for an established player from year to year. From about a five-year career on, average salary for years played increased substantially to exceed over $20,000 for over 10 years and like increases are obtained as years played increases. Also of interest is the fact that over 50 percent of the players surveyed played in the major leagues for nine or more years. This actually understates major league careers of the players surveyed as 254 of them were on major league rosters at the end of August, 1969.

Pension Credits

Of the 498 players on major league rosters at the end of August, 1965, 86.5 percent were vested as of the end of the 1969 season. As 254 were in major league rosters as of that time, it is expected that the percentage vested will increase as a number of players are active (i.e., on major league rosters) with three pension years credited to them. It also is possible that some inactive players (i.e., not on major league rosters) will become active and obtain the additional time needed to become vested (four years for category four players—which all but five category three players on the 1965 roster were).

Cumulative Salaries Averaged by Number of Years Played

496 Players on Major League Rosters—August, 1965

Number of Years	Number of Players	Average Major League Salary
1	3	$ 7,666
2	7	10,322
3	8	7,854
4	14	9,909
5	29	8,818
6	35	13,678
7	67	15,087
8	64	17,621
9	52	19,021
10	47	18,530
11	43	21,541
12	45	22,305
13	21	22,390
14	18	23,387
15	16	25,749
16	11	29,834
17	8	26,471
18	4	40,372
19	5	36,458
20	0	—
21	1	Withheld to avoid disclosure of specific salary information

* The above figures do not include bonuses, deferred compensation, income from off-season employment, business ventures, endorsements, etc. Where players were optioned to the miners, released, and so on, payments were allocated as provided for in standard contracts.

Players on Major League Rosters

August 31, 1965

Pension Credits—April 30, 1970

Pension Years Credited	Inactive April 30, 1970	Active April 30, 1970	Total
0	3	0	3
1	19	0	19
2	20	4	24
3	12	9	21
4	13	10	23
5	19	39	58
6	29	36	65
7	19	38	57
8	14	24	38
9	12	29	41
10	14	21	35
11	16	9	25
12	10	11	21
13	10	8	18
14	12	5	17
15	4	3	7
16	5	4	9
17	3	2	5
18	6	1	7
19	2	1	3
20	2	0	2
	244	254	498

Vested—431 Not vested—67 86.5% vested

* Under present contract players are vested when they reach the four-year level. This applies to category IV players. There are five category III players included above, with a vesting period of five years, and a lower level of benefits.

Obviously, the 254 active players will continue to build up credits for pensions years, as do major league coaches and managers.

Under the present pension plan, a player is vested after four baseball years, a year being 172 days on a major league roster. Thus, a player may have a career longer than his pension years credited to him, as he may be off a major league roster for part of one or more seasons during his career. He also may have more pension than playing years because of credits received as a coach or manager or for time lost in military service. Players are credited with quarters of years and multiples thereof. For the purpose of our analysis, we counted a full year for 87 days or over and no credit for 86 days or under.

Illustrations of Pension and Related Benefits

Pension Years	Retirement at Age 50 Monthly Benefit	Single Payment Cost Age 50	Single Payment Cost at Various Ages			
			25	30	35	40
5	$300	$ 57,900	$18,300	$22,900	$28,700	$36,100
10	600	115,800		45,900	57,400	72,100
15	700	136,500			67,700	85,000
20	800	157,200				97,900

Pension Years	Retirement at Age 65 Monthly Benefit	Single Payment Cost Age 65	Single Payment Cost at Various Ages			
			25	30	35	40
5	$ 772.56	$108,800	$14,800	$18,500	$23,200	$29,300
10	1,945.11	217,600		37,100	46,500	58,300
15	1,745.11	250,300			53,500	67,100
20	1,945.11	283,000				75,900

The foregoing table present illustrations of pension benefits at various levels of service and at age 50 and 65. The cost of single payments to buy equivalent benefits at various age levels also is shown. Thus, if a player is credited with five years of pension service and becomes inactive at age 25 the single payment cost to obtain his $300 a month pension at age 50 is $18,300, and for retirement at age 50 is $14,800.

Likewise the single payment cost for a 10 year pension service benefit achieved at age 35 is $57,400 if retirement is at 50 and $46,500 if retirement is to be at 65.

For retirement at age 50 with 15 years of service, the single payment required would be $67,700 if achieved at age 35 and would be $85,000 if achieved at age 40.

In addition an active player (on a major league roster for more than 60 days and active) is entitled to $50,000 Life and Accident and Dismemberment insurance coverage at a premium cost of $216. He and his family receive health care coverage at a premium cost to the clubs of $392 and dental coverage at a premium cost of $134. The three premiums have a total value of $742 for each active player.

Thus, it is clear that big league baseball players receive substantial benefits directly from baseball over and above their salaries. This conclusion is borne out by the level of payments to the pension fund in recent years.

According to the Combined Statements of Income (Loss), players' pension fund payments were $4,132,000 in 1967, $4,173,000 in 1968, and $5,450,000 in 1969. As a percentage of team salaries (including managers, coaches and trainers), pension fund payments were 26.3% of salaries in 1967, 25.0% in 1968 and 27.5% in 1969. In terms of player roster places and managers, coaches and salaries (for each club 25 places on the active roster, one manager, four coaches, and one trainer), the average payment per person was $6,665 in 1967, $6,763 in 1968 and $7,325 in 1969. The average salary of players on rosters in August,

1969 was $24,957, so the average payment would be about 29 percent of average salary. Obviously, the payment is very large when related to a player with a salary of $15,000 (nearly 50%) while it would be less than 10% for a player making $75,000 or more a season.

It is understandable that substantial payments would have to be made to provide the benefits called for in the major league baseball players benefit plan, as baseball players have a shorter active career, than do workers in many other occupations. However, these payments represent a substantial addition to team operating costs over and above players salaries and should be taken into account in evaluating salary levels.

Player Replacement and Development Cost

Disappearances From Rosters

In order to relate the cost of player development and minor league operations to the number of players who become active and must be replaced, we surveyed the disappearance of players from major league rosters as of the end of August, 1963 through the end of August, 1967. The end of August was selected as this is the time at which players on club rosters are eligible for participation in the World Series if their club qualifies. If a player never was on a major league roster at the end of August, he clearly was not a major league ball player during the period in question.

Years in Which Players Became Inactive

Year	Total	
1963	54	
1964	74	
1965	56	
1966	93	
1967	97	
	374	Average 74.8

We also checked major league rosters for 1968 and 1969 to determine if players who disappeared from rosters in 1966 and 1967 rejoined rosters in those years. It is not uncommon for a player to not be on a major league roster for one to three years and then reappear.

In order to offset any effect of starting with August 31, 1963 in the first year and perhaps understating disappearances and of overstating disappearances in 1967 as some players may yet rejoin rosters, we also made an analysis using 1964, 1965 and 1966, for which years there were 223 disappearances for an average of 74.3 players.

Development Costs and
Costs of Minor League Operation

Player development costs and costs of minor league operations as reported to Arthur Andersen & Co. by the major league clubs were as follows:

	$000
1963	$ 22,220
1964	22,208
1965	21,968
1966	24,620
1967	27,203
Total	$118,219

Costs for 1964, 1965 and 1966 totalled $68,796,000.

On the basis of the above figures, clubs were spending at the rate of $316,000 for each player replaced for the period 1963-1967 inclusive. For the three-year period 1964-1966 inclusive, clubs spent at the rate of over $308,000 per player replaced.

The above figures are indicative of the rate of expenditure but cannot be precise as expenditures in 1965, 1966, and 1967 undoubtedly relate mainly to players who would be added to replace disappearances in 1968, 1969, 1970 and beyond. However, they do relate on a current cash expenditure and replacement basis.

Baseball clubs signed a total of 3,350 new players in 1964, 1965 and 1966. If the disappearance rates remain the same in the future as for those three years, less than 7 percent will become major league ball players.

Club expenditures for player development and minor league operation increased to $27,560,000 in 1968 and to $31,074,000 in 1969. Average expenditure per club, which had been running at about $1,100,000 in 1963, 1964 and 1965 increased to a level of about $1,300,000 in 1967, 1968, and 1969.

The addition of four new clubs should extend the career of some players, which should reduce the rate of disappearance. However, the need to add 100 players to major league rosters may also result in bringing players up prematurely, which could increase the disappearance rate in the early 1970's. In any event, over a period of time the number of total disappearances should increase reflecting the larger number of clubs and players involved, and, as we have seen, expenditures on player development and minor league operation likewise have increased, reflecting the increase in the number of clubs and the number of roster places which must be filled.

Service According to Pension Plan Records

In order to obtain an understanding of the number of years the players who disappeared during the 1963-1967 period played, we analyzed their playing service according to pension plan records. A pension year is 172 days, or a full season. For this analysis we excluded credit for time lost in military service, as this was non-playing time. Less than half a year was not included, over half a year was counted as a full year.

The table summarizing our analysis is on the following page. Based on all disappearances and cumulative years of playing service, the average player covered in the survey who appeared at least once in a major league roster at the end of August had six years of playing service.

If players are not considered who do not have at least two full years of playing service, the average playing service of the remaining players increases to 7.4 years.

SUMMARY OF DISAPPEARANCES FROM MAJOR LEAGUE BASEBALL ROSTERS—1963-1967

(Major League playing service according to pension plan records)

Years of Service	Total	Cumulative Years
Less than 1	18	0
20 or More	3	63
1	60	59
2	49	98
3	27	81
4	16	64
5	30	150
6	28	168
7	22	154
8	10	80
9	18	162
10	20	200
11	20	220
12	15	180
13	6	78
14	10	140
15	4	60
16	7	112
17	9	153
18	1	19
19	7	19
	374	2259

* Note: the pension records summarize playing time according to years and days of service

If only players are considered who have four years or more service (vested), the average playing service for the 220 remaining players becomes 9.2 years.

Obviously comparing player development and minor league costs to the 296 players with two or more years of playing service, or to the 220 players with four or more years of playing service, i.e., more qualified and established players, rather than to the 374 who disappeared would result in a substantially increased rate of expenditure per player replaced during the 1963-1967 period. If the experience of the replacements is the same as that of the players who disappeared, the rate of expenditure for players with two or more years of service would be just under $400,000 per player for the 1963-1967 period and over $537,000 for players with four or more years of playing service.

ANALYSIS OF ECONOMICS OF OPERATIONS—ORGANIZED BASEBALL

The accompanying analysis which regroups and combines the percentage distribution of revenue shown on pages 1 and 2 of the *Combined Statements of Income and Related Information for 1965 Through 1969* prepared by Arthur Andersen & Co., shows an increase over the five-year period of expenses directly related to playing the games, from 47.7 percent of revenues in 1965 to 51.9 percent in 1969. The major increases came in player salary and pension fund benefits and in other costs of team operations. Gross margins on games was thus reduced from 52.3 percent in 1965 to 48.1 percent in 1969.

Selling, general and administrative expenses likewise increased in relative importance over the period, going from 14.8 percent in 1965 to 19.2 percent in 1969. The portion of revenue expended on player development and minor league operations varied during the 1965-1969 period, but started at 25.0 percent and ended at 25.2 percent for little net change.

However, the net effect of the various changes in percentage of revenue expended on game costs and selling, general and administrative costs resulted in a reduction of the net margin after the various expenditures (largely of a cash

nature) related to game operations and player replacement from 12.5 percent and 14.5 percent in 1965 and 1966 respectively, to 5.2 percent, 4.2 percent and 3.7 percent respectively in 1967, 1968, and 1969.

It is these revenues as distributed and expended which support baseball organizations and players. The reduced net margins in the last three years indicate that baseball is at a marginal level in generating operating revenue to pay operating expenses.

ORGANIZED BASEBALL

PERCENT ANALYSIS OF REVENUE AND EXPENSES
ORGANIZED BASEBALL

	1965-1969				
	1965 % of Operating Rev.	1966 % of Operating Rev.	1967 % of Operating Rev.	1968 % of Operating Rev.	1969 % of Operating Rev.
Operating Revenues					
Ticket Sales	62.9	65.6	63.3	60.9	61.2
TV & Radio	25.7	23.3	25.9	28.6	27.2
Concessions & Advertising	12.4	11.1	10.8	10.5	11.6
	100.0%	100.0%	100.0%	100.0%	100.0%
Operating Expense					
Team Operations—Salaries and Pension Funds	18.5	17.2	19.7	20.8	20.5
Other	6.0	5.7	6.6	7.1	8.6
Stadium Rental and Dep'r and Amortization of Stadium and Stadium Improvements and Real Estate Taxes	8.4	8.7	8.6	8.6	7.2
Ground Operation and Maintenance	7.5	7.5	8.6	7.9	8.1
Game and Ticket Office	7.3	7.1	7.5	7.2	7.5
Sub-Total	47.7%	46.2%	51.0%	51.6%	51.9%
Gross Margin on Games	52.3	53.8	49.0	48.4	48.1
Selling, General and Adm. Exp.	14.8	14.7	16.2	16.8	19.2
Net Margin on Games	37.5%	39.1%	32.8%	31.6%	28.9%
Player Development and Minor League Operations Fees	25.0	24.6	27.6	27.4	25.2
Net Margin on Games After Player Replacement Expenses	12.5%	14.5%	5.2%	4.2%	3.7%

Attendance 1960-1968 by Population and Standing

An analysis of attendance statistics related to standing (1st or 2nd division) and to size of city reveals the importance of size of city to attendance. The larger the city the more likely a first division finish will result in attendance of more than a million.

For cities of over 4 million population 36 first division finishes between 1960 and 1968 resulted in attendance of over one million 27 times, or 75 percent of the time. For cities with population between 2 and 4 million people 28 first division finishes resulted in attendance of over one million 18 times, or 64 percent of the time. However, for cities with less than two million population, 27 first division finishes resulted in attendance of over one million 15 times, or 56 percent of the time.

For all the cities for which attendance was analyzed, attendance exceeded one million 88 times and fell below one million 86 times. Leaving out the effect of new stadiums (sometimes combined with a new team or location as in the case of Anaheim, Houston, Minnesota, Mets, etc.), teams in cities of over 4 million population had attendance of over one million 32 times and under one million 25 times. Teams in cities with population between 2 and 4 million had attendance of over one million 33 times. Teams in cities of less than two million population had attendance of over one million 15 times and less than one million 28 times.

Overall, teams in cities of over 4 million population enjoyed attendance of over one million 41 times and less than one million 25 times. Teams in cities of less than 4 million population had attendance of over one million 47 times and attendance of less than one million 61 times. The impact of a new stadium on attendance is revealed by the fact that of the 28 instances in which a second division finish was accompanied by attendance of over one million, 19 of these were associated with a team playing in a new stadium.

Attendance—By Size of City and 1st & 2nd Division 1960-1968—American & National Leagues

	Over One Million			Under One Million	
	1st Div.	2nd Div.		1st Div.	2nd Div.
		New*	Old		
Population SMSA* 1966					
Under 2 million	15	10	0	12	16
2-4 million	18	1	3	10	23
Over 4 million	27	9	5	9	16
	60	20	8	31	55

* New city, new club, and/or new stadium.

Population Estimates from Sales Management Magazine, Annual Survey of Buying Power—1967
Attendance Statistics from World Almanac 1963, 1966, 1969

Cities Under 2 Million	2-4 Million	Over 4 Million
Anaheim	Boston	Chicago
Atlanta	Cleveland	Detroit
Baltimore	Pittsburgh	Los Angeles
Cincinnati	San Fran.-Oakland	New York
Houston	St. Louis	Philadelphia
Milwaukee	Washington	
Minn.-St. Paul		

John J. Gaherin

Direct Examination by Mr. Hadden:

[1555] Q. Would you describe in a general way, please, the organization of the Players Association to the extent of your knowledge of it? A. Well, to the extent of my knowledge of it, Mr. Miller is the executive director and chief administrative officer of the Association, Mr. Moss is its counsel, and they are assisted by a rather charming staff; and in their [1556] negotiation with us Mr. Miller and Mr. Moss act as the principal spokesmen and are associated with various player representatives who participate from time to time.

Q. You have used the phrase "player representatives." Would you tell the Court what that means? A. Yes. Each of the 24 clubs, the players of the 24 clubs, elect a player representative, and I understand those player representatives then in each league elect a so-called league representative, and those 26 individuals constitute the player representatives and if my understanding is correct also what is tantamount to the board of directors of the Association.

Q. Does that board have a formal name? A. It is termed the executive board.

Q. Who is responsible for the conduct of negotiations on the clubs' side of the bargaining? A. Well, I act as spokesman associated with counsel for the leagues, and generally the two league presidents are present and sometimes other officers and officials of the clubs.

Q. During your years of association with major league baseball, have you had responsibility to conduct negotiations on important matters with the Players Association. [1557] A. Yes.

Q. How many would you say important or vital negotiations have been conducted in that space of time? A. I would say there were three, Mr. Hadden.

Q. And have you been, during the course of those negotiations, in daily contact with Mr. Miller and Mr. Moss and the Players Association through them? A. Oh, yes.

Q. And as a result of that experience, have you formed an opinion as to the effectiveness of Mr. Miller and Mr. Moss as representatives of players? A. Yes, I have.

Q. What is your opinion? A. I think they are exceptionally well qualified and extremely able in their present occupation.

Q. Have you also formed an opinion as to the relative bargaining position or positions of bargaining strength of the clubs on the one hand and the players on the other?

Mr. Topkis: I object, your Honor. I don't believe that is a subject on which opinion evidence is proper.

Mr. Hadden: Mr. Topkis, would you do me the favor and let me hear what you are saying?

Mr. Topkis: I beg your pardon. I thought I [1558] was not suffering from inaudibility. It is perhaps early in the morning. May the reporter read my remark back, your Honor?

The Court: Yes, please.

(Record read.)

Mr. Hadden: I think that the witness, your Honor, has demonstrated beyond possibility of misunderstanding his qualification as an expert in the labor field and I think it is an appropriate question.

The Court: Objection overruled.

Will you read the pending question, please?

(Question read.)

A. Yes, sir, I have.

Q. Will you tell the Court what your opinion is, please. A. I believe the relative strengths are about as equal as any situation can produce.

Q. You have referred to three principal negotiations? A. Well, the first of those negotiations, Mr. Hadden, was what we have referred to as the first basic agreement between the Players Association and the 24 major league clubs. It began August of 1967.

Mr. Hadden: Excuse me a moment, your Honor.

The Court: Surely.

[1559] Q. The first basic agreement, Mr. Gaherin, is that the document which is in evidence as Defendant Feeney Exhibit F, the brown pamphlet? A. Yes.

Q. Can you tell the Court, please, over what approximate period of time that agreement was negotiated? A. Approximately, Mr. Hadden, from the latter part of September, 1967, until, if my memory serves me correct, until about the middle of February of 1968.

Q. And were negotiating meetings with the Players Association held frequently in that connection? A. Yes, they were.

Q. Mr. Gaherin, were you in court several days ago when Commisioner Kuhn testified? A. I was.

Q. Did you hear the questions and answers which he gave in which he defined what he understood to be the reserve system in organized baseball? A. I did.

Q. Do you agree with his answers as given to those questions? A. I do.

Q. All right. Now I would like to refer again to the first basic agreement negotiated and with the exception [1560] of the discussions which may have taken place with regard to the reserve system in that negotiation, would you describe for the Court, please, the principal changes in employee benefits, and working conditions which resulted from the adoption of the first basic agreement? If necessary, would you refer to whatever notes you may have? A. Well, the first basic agreement, I would say that the principal changes that occurred as a result of that agreement was an increase in the minimum salary from $7,000 per season to $10,000 per season. That is number one.

Number 2, the maximum salary cut was reduced from 25 per cent of the previous season's salary. The spring training meal allowance was increased from $8 per day to $12 per day, and the spring training miscellaneous allowance, sometimes referred to as Murphy money, was increased from $25 a week to $40 a week, and the in-season meal money was increased from $12 per day to $15 per day.

The next area I think of significant improvement is in the grievance procedure. Now, while the players always had access to the Commissioner of Baseball as the final adjudication of disputes except those involving individual salaries, there was no formal procedure except that promulgated by the Commissioner himself for the conduct of such matters. We negotiated with the Association a [1561] formal grievance procedure providing for a terminal of handling grievances with a final and binding arbitration by the Commissioner of Baseball.

Q. And is that grievance procedure what is included in the brown booklet, Exhibit F, as Schedule C? A. Yes, sir, it is.

Q. Included in which is an appendix which contains rules of procedure negotiated between the parties? A. Yes, sir.

Q. What was the next negotiation which the clubs undertook with the Players Association? A. The next negotiation was the players' benefit plan, and that was the next one.

Q. When did those negotiations take place? A. They took place during the latter part of 1968, the formal negotiations, and the early part of 1969.

Q. Again, were many negotiating sessions held with the Players Association in that connection? A. Yes, there were a great many sessions held.

Q. Did those negotiations conclude in an agreement? A. Yes, sir, it did.

Q. Have you a copy of the agreement there with you? A. Yes, sir, I have.

Mr. Hadden: Mark this, please.

[1562] (Defendant Feeney et al Exhibit M marked for identification.)

Q. I hand you what has been marked Defendant Feeney Exhibit M and ask you if that embodies the agreement which was negotiated to a satisfactory conclusion in early 1969. A. Yes, except for an insert of some additional

changes which has not yet been placed in these copies; but that is the basic benefit language.

Q. Does that agreement represent a new benefit plan or was that a continuation of a former benefit plan which had previously been in existence? A. This is the former plan upgraded.

Q. When was the major league baseball players' retirement or benefit plan started? A. As I recall, about 1947 was the first effort at a pension plan.

Q. And was it amended from time to time during the interim prior to the form in which it now exists in Exhibit 14? A. Yes, sir.

The Court: For identification.

Mr. Hadden: For identification. I offer the exhibit in evidence, your Honor.

Mr. Topkis: No objection, your Honor.

[1563] The Court: No objection. Received.

(Defendant Feeney et al Exhibit M received in evidence.)

Q. Immediately prior to the effective date of the present benefit plan, Exhibit M, what was the level or amount of club contributions which were required under the prior agreement? A. $4,100,000 per year.

Q. And was that payment made on behalf of all 24 major league clubs or 20 at the time it was? A. Yes.

Q. For the benefit of active and inactive players? A. Yes.

Q. Would you describe briefly for the Court what the principal changes in benefits were which resulted from the adoption of Exhibit M and also tell the Court, if you would, please, what the new level of contributions was which was negotiated at that time. A. Well, I suppose that most significant improvement was the level of contribution itself. The contribution was increased to $5,450,000 a year, which I think equates to about a 33 per cent increase in the contribution.

The next improvement would be the reduction of [1564] the required time in which a member can vest from five

years to four years. That brought into the plan a whole new group of people who had previously not shared in its benefits, and I suppose the next feature—

Q. You said people who had not shared in the benefits. By that do you mean retirement benefits? A. Retirement benefits. They were not vested. Then the next step I suppose was the provision for so-called early retirement at age 45 on an actuarially reduced basis. I would say those are the significant ones. And, if I may, I refer to the descriptive material in the agreement itself and at the very last page of the agreement is a computation of the money pension benefits.

Mr. Hadden: Would you like to see a copy of this, your Honor?

The Court: Thank you.

(Document handed to the Court.)

Q. Continue your answer. A. All right. And using, just for the purpose of illustration, a member with five years of credited service and who at age 50 would elect to retire, under the terms of the new agreement he would receive $300 per month. Under the agreement previously in effect it would have been $250. If that same individual retired with ten years [1565] of service, he would receive now $600 a month versus $500 a month in the old agreement.

And if a man with 20 years of service did not retire until he was 65 years or over, his pension would be approximately $23,340 a year. I say approximately, because I have dropped pennies in the computation.

Q. Is it not also true that the benefit plan includes a variable feature which may also— A. Which would affect that.

Q. Affect the ultimate amount. A. No, as has been said by previous witnesses, this is more than a pension plan. This is an all-encompassing benefit plan, and we improved those features of the plan, too. The widow's benefit was improved with a payment of $50 per month for each qualified dependent; the disability benefits were increased from $500 to $700 per month, again with provision for the de-

pendents; and the insurance schedule, which for active people under the old agreement—

Q. Is that life insurance? A. Life insurance. —ranged from 15,000 to 50,000, was changed to a flat $50,000 coverage for the vested or for the active player and the inactive range previously was $12,500 to $25,000. That was established at a flat $25,000.

[1566] Our health care benefits, I guess you would call that so-called hospitalization benefits, was increased from $15,000 to $25,000 maximum. The maternity benefits were increased from $500 to a maximum of $750.

We established for the first time a dental plan. I would say, Mr. Hadden, in brief, those are the significant changes in the plan.

Q. Mr. Gaherin, would it be a correct assumption that a major league baseball player with as little as four years of service in major leagues becomes entitled as a matter of right to receive a retirement pension under the terms of the plan which he may elect to receive as early as 45 years of age? A. That is correct.

Q. On what date was the agreement with reference to the benefit plan reached, Mr. Gaherin? A. Well, the actual agreement was reached, as I recall it, February 25, 1969. I may be off a day or so.

Q. Prior to that time, what instructions or suggestions, if any, had been issued, to your knowledge, by the Players Association to the individual ballplayers? A. Well, during the negotiations, as part of the bargaining tactic, they encouraged the players to withhold signing their 1969 season contracts.

[1567] Q. When was spring training scheduled to commence, Mr. Gaherin? A. In March.

Q. 1st of March? A. 1st of March.

Q. And what was the club's experience in reference to significant numbers of players actually withholding their signatures from their contracts? A. There were a significant number of players who had not signed their contracts approaching spring training.

Q. And was that among the circumstances which the clubs took into account in its negotiations with the players? A. Yes.

Q. Now, Mr. Gaherin, there has been reference in the testimony here to the fact that the parties have again been in negotiations currently or recently with respect to the negotiation of an extension of the basic agreement. Is that true? A. That is true.

Q. Would you describe, please, for the Court what the course of those negotiations has been? A. I think, Mr. Hadden, that for all intents—

Q. Excuse me a second. Would you leave out of [1568] your consideration for the moment at least, the reserve system. A. All right. I would say for all intents and purposes we have reached an agreement with respect to a successor to the first basic agreement.

Q. When did negotiations with reference to the new agreement start? A. Last fall, in September.

Q. How many meetings, approximately, have been held with the Players Association in those negotiations? A. Approximately 35.

Q. Mr. Gaherin, you say that an agreement has in effect been reached. What form does the agreement take at this time? A. Well, the form of the agreement would be a written proposal which we submitted to the Players Association under date of May 1, and oral understanding with respect to amendments to that proposal which seal the deal.

(Defendant Feeney et al Exhibit N marked for identification.)

Q. I hand you a document dated May 1, Mr. Gaherin, marked for identification Feeney Exhibit N. Is that the proposal which you have previously described? A. This is the proposal which we submitted on [1569] May 1, 1970, and which we orally amended thereafter; yes.

Q. You referred to certain amendments, certain oral amendments, Mr. Gaherin. Would you tell the Court when and how those amendments became effective? A. About

May 4—I am talking from memory now, without my notes—about May 4, after several meetings with the Association following a rejection of the proposal first presented to the players, the club—

Q. By whom? A. By the players, major league baseball players.

Mr. Topkis: Excuse me. I rise merely in the interests of clarification. Does the witness mean Exhibit N for identification?

The Court: Is that what you mean?

The Witness: Yes, Mr. Topkis, that is what I was referring to.

Q. In other words, if I understand you, Exhibit N unamended, the document of May 1, was submitted to the Players Association on May 1 and was rejected by them? A. That is correct.

Q. How was that rejection evidenced? A. It was evidenced by a vote of the players in each of the 24 clubs and transmitted—and that information transmitted to us by Mr. Miller.

[1570] Q. Did Mr. Miller transmit information as to the number of votes by which the proposal failed of being adopted? A. He orally advised us of the vote in each of the clubs, yes.

Q. If you recall, what was the approximate total votes of ayes and nays to that proposal? A. I don't recall it in those terms. I recall that only one club voted for it.

Q. 23 voted to reject it? A. Yes.

Q. What negotiations took place thereafter which resulted in the amendments which you referred to? A. We had several additional meetings and agreed to improve that offer in three areas.

Q. Would you describe those? A. Yes. There is a provision in the original proposal which provided for the elimination of—excuse me—of the deduction of 10 per cent of the receipts of the first three games of the divisional playoffs as club expenses.

Q. So the Court understands what that means, Mr. Gaherin, what are the divisional playoffs? [1571] A. That is the contest held in each of the leagues to determine the champion of each league.

Q. At the end of the season? A. At the end of the season.

Q. And that championship then goes on in the World's Series to play— A. Goes on in the World's Series to play the opposing league.

Q. So there was a deduction of 10 per cent from what? A. From the gate receipts of the first three games which was eliminated—that proposal was eliminated in our amendment.

Q. Are the players entitled under the proposal before and after the amendment to share in the proceeds of those first three games? A. Yes, 60 per cent.

Q. And, as I understand it, that expense deduction, that 10 per cent deduction, was eliminated as a result of the further negotiations? A. Yes.

Q. What were the other two changes? A. We changed the proposal with respect to the allowances that would apply to players who are unconditionally [1572] released both in spring training and in the season. Prior to the present season, there was no provision for any allowance to a player who was unconditionally released during spring training. We have now established a 30-day payment. In-season for the year 1970 a player who is unconditionally released would received 60 days. Our original proposal was 40 days —45 days termination pay. In 1971, he will also receive 60 days termination pay.

In 1972 he will receive 60 days if he is terminated before May 15. On and after that he would receive the balance of the payments due under the terms of his original contract.

There are also some restrictions so that this termination allowance is a make whole, so that he can not profit by the receipt of termination allowances.

Q. What was the third change? A. The third change, the clubs agreed that in the event, in 1972, the Association press a proposal for a reduction in the number of games

that will be played in the 1973 season and thereafter, we will not, as a defense, rely upon the fact that there may be existing radio or television contracts which provide for a specified number of games to be televised or broadcast, all other defenses remain intact, whatever they may be.

[1573] Q. If you can, Mr. Gaherin, and basing your estimate upon last year's figures, can you give the Court an estimate of the approximate value of the clubs' agreement to forego the 10 per cent expense money from the playoffs? A. Round figure?

Q. Round figure. A. About 250,000, 260,000 dollars.

Q. Well, is that the 10 per cent or is that the gross? A. That would be the 10 per cent.

Q. That would be the 10 per cent? A. Yes.

Mr. Topkis: What?

Mr. Hadden: Let us check that.

I now offer Exhibit N in evidence, your Honor.

Mr. Topkins: No objection, your Honor.

(Defendant Feeney et al Exhibit N received in evidence.)

Q. Now, Mr. Gaherin, would you for the moment withdraw from consideration whatever agreements may have been reached by the parties with reference to the reserve system and tell the Court the principal changes in working conditions and benefits which the players will not receive under the new agreement? A. All right. Again starting with the minimum salary, [1574] that has been raised for this season from $10,000 to $12,000 per year.

In the 1971 season to $12,750 per year and finally in 1972 to $13,500 per year.

Now, the World Series pool and divisional playoff compensation has been changed and improved. First, there is now a single pool. 60 per cent of the gate receipts of the first four games of the World Series, after deducting 15 per cent for the Commissioner's office, are applicable to players and that does not represent a change.

60 per cent of the gate receipts from the first three divisional games are paid to the players. Previously it was a

division of 50 per cent of the total gate receipts for the first three games less the actual expenses incurred by the club.

The maximum salary cut permissible under the contract has been reduced from 20 per cent of the previous season's salary to 20 per cent in any one year and a maximum cut of 30 per cent over two consecutive years.

The spring training meal allowance has been raised from $12 per day to $13 per day this year, and in 1971 to $14 per day, plus any applicable cost of living adjustment. And in 1972, $14 a day plus the applicable cost of living adjustment.

[1575] The spring training and miscellaneous allowance has been moved upward from $40 per week to $50 per week this year, and in the subsequent years it remains at that level but is backed up by applicable cost of living adjustment.

The in-season money, meal money, has been raised from $15 per day to $16 per day this year, $17 per day in 1971 plus any applicable cost of living adjustment and $17 a day in 1972 plus any cose of living adjustment.

The termination pay has been improved from 30 days for players released in-season without any consideration for the man released during spring training to 60 days for the men released in 1970. Similarly in 1971 and in '72, 60 days if released prior to May 1st, and the—

Q. May 15th? A. May 15th, excuse me, and the balance due under the contract if released thereafter, and 30 days for the man released during spring training.

The grievance procedure has been dramatically overhauled. We have provided for a grievance procedure—

Mr. Hadden: One moment, the Court is occupied.

The Court: Excuse me.

(Pause.)

The Court: Sorry.

A. We provided for a grievance procedure which sends [1576] to the Commissioner all matters which involve the

integrity of the game or maintenance of public confidence in the game, and his decision in all such matters is final and binding upon the parties with the same authority as any arbitrator's decision.

The second part of the grievance procedure provides for grievances arisng out of the interpretation or the application of the basic agreement being ultimately referred to a panel of arbitrators, each of the parties to select a party and probably those two to try to select upon a third. We have some more talking to do but the principle is it goes to a panel of arbitration and the neutral man will not be the Commissioner in this case.

Q. Based upon the statements made to you by Association representatives in the course of the bargaining, what is your understanding as to the importance placed by the Association on the changes which you have just described?

Mr. Topkis: Objection, your Honor. Those would be hearsay, I should think.

Mr. Hadden: I am asking him not to repeat anybody's statement. I have asked him what his understanding is, your Honor.

Mr. Topkis: Based on the hearsay.

The Court: Yes, I know it is, but the frequency, [1577] the constancy of this witness's participation in all these matters warrants my taking it, not as the final piece of proof on that issue, but it is admissible. I will take it.

Objection overruled.

The Witness: May I have the question?

The Court: Yes. Will you please read it, Mr. Court Reporter.

(Question read.)

A. The most important single issue involved in the bargaining.

Q. Mr. Gaherin, have you had responsibility for the handling on behalf of the clubs of grievances filed during

the past two years under the first basic agreement? A. Yes, sir.

Q. And can you tell the Court, please, in whatever terms you can, what approximate percentage or number of grievances you can, what approvimate percentage or number of grievances previously processed by the clubs and the Player Association would have gone to outside arbitration under the new system? A. Most, if not all.

Q. Thank you. Now, have you completed your review of the principal changes? A. I think probably there are two others that are significant, in the area of rules changes, which would affect the benefits of the players or an obligation of the play- [1578] ers. The previous agreement required only that we discuss and notify the Association in advance of making these changes. In effect, we are now obligated to negotiate with them concerning such changes.

Another change is that we have perhaps formalized a right that really existed and that was the player may be represented in his individual salary negotiations by a person of his own choosing.

I would say that's about it.

Mr. Kramer: Could I have that last answer read, your Honor?

The Court: Of course. Would you be good enough to do that, Mr. Court Reporter?

(Answer read.)

Mr. Topkis: If I may, your Honor, the answer was so long that with Mr. Kramer I was not certain of all of its contents, but I would move to strike so much of it as speaks of a right which was already in existence. I don't know how the witness could know about that right, and the testimony of the club owners and executives has been unanimously to the contrary.

Mr. Hadden: I concede that it may be stricken, your Honor.

The Court: Strike it.

[1579] Mr. Hopkis: Thank you.

Q. Now, Mr. Gaherin, was there also inserted into the agreement for the first time a recognition clause? A. Yes.

Q. What is the nature of that change? A. If I may summarize it, the clubs recognize the Players Association as the exclusive bargaining agent except for salaries above the minimum and certain special covenants.

Q. Do the clubs recognize the Players Association as the official bargaining agent for the players as a group? A. Yes.

Q. Turning to the subject of the reserve system, Mr. Gaherin, do the clubs recognize that the reserve system is a mandatory subject of bargaining upon which the clubs are legally obligated to bargain with the Association? A. Yes.

Q. Now, referring once again to the—

The Court: Would you mind, Mr. Hadden? How long has that been so?

Mr. Hadden: Would you answer that question, Mr. Gaherin?

The Witness: The National Labor Relations Board, having asserted its jurisdiction over baseball, and the clubs having acquiesced in that action, we recognized that we had [1580] an obligation of bargaining.

The Court: When was that?

The Witness: The assertion of jurisdiction was—

The Court: Approximately.

The Witness: Some time last year.

The Court: Thank you.

Q. And before the beginning of this lawsuit? A. Yes, before the beginning of this lawsuit.

Q. And did the clubs undertake any negotiations with the Players Association with reference to the reserve system in the course of the negotiations leading to the first basic agreement? A. Yes, sir.

Q. Would you describe what the course of those negotiations was? A. Yes. The proposals of the Association which were served August 1st, I think, of 1967, contained, among

other things, a rather vague statement concerning the reserve clause.

Mr. Topkis: If your Honor please, if the witness has concluded his answer to the question, I would suggest that these proposals, which I take it were in writing, are the best evidence of their contents, and since we are in a rather delicate area I would think it appropriate that [1581] the writing rather than the witness' testimony be the evidence to which we refer.

The Court: I should think so.

Mr. Hadden: I am prepared to suit your pleasure, Mr. Topkis.

Q. Have you brought with you, Mr. Gaherin, a copy of the proposals submitted by the Players Association at the commencement of the first basic agreement negotiations? A. Yes.

(Defendant Feeney et al. Exhibit O marked for identification.)

Q. And is this document entitled Major League Baseball Players Association Statement of Policy, July 28, 1967, which has been marked for identification Defendant Feeney Exhibit O, the proposals to which you have referred? A. Yes.

[1582] Q. And at what page does the material appear with regard to the reserve system? A. At Page 5 under the heading "Reserve Clause."

Mr. Hadden: Your Honor, so the record may reflect what that language is, I will read it into the record.

The Court: It is not in evidence yet.

Mr. Topkis: I think it is improper until it is in evidence. I will tell my friend I have no objection to its being received in evidence.

The Court: He is so far ahead that these little things like getting them into evidence bothers him.

Mr. Hadden: May I offer the document?

The Court: You certainly may.

Mr. Topkis: Again, your Honor, this is a marked up copy. May a clean copy be substituted?

The Court: I am sure counsel will see to it.

(Defendant Feeney et al Exhibit O received in evidence.)

Mr. Hadden: I am reading from a page which Mr. Gaherin has referred to, your Honor. The caption is "reserve clause" on Page 5:

"The present Uniform Player's contract provision under which a Club asserts the right to renew the contract [1583] without the player's agreement and to determine unilaterally the salary to be paid (subject only to limitation on the amount of a cut), requires a review.

"The impact of this provision is to deprive the player of bonafide bargaining power in his salary 'negotiations' with the club. In addition to placing the player in the untenable position of being required to accept the Club's proposed salary or leaving organized baseball, the reserve clause is of doubtful legality.

"The solution to this problem lies neither in a sudden elimination of the reserve clause, whether by judicial decree or otherwise, nor in the preservation of the status quo. We find no validity in the calamitous predictions that chaos will result from any change whatsoever. Rather, the solution lies in a reasoned, open-minded approach which seeks an accommodation in the interest of fairness for the player in his salary negotiations and of the growth and prosperity of baseball as a whole."

Q. Mr. Gaherin, following the club's receipt of this paper which was when, approximately?

The Court: This paper referring to exhibit—

Mr. Hadden: Excuse me. Exhibit O, your Honor, yes.

A. About August 1, 1967.

[1584] Q. Following that, what discussions or negotiations did the clubs have with the Players Association with reference to the reserve system? A. We discussed that proposal.

The Court: And by "that proposal," do you mean what—

The Witness: Appearing at Page 5.

The Court: —Mr. Hadden just read into the record?

The Witness: Yes, sir.

A. And during the course of the discussions at one point Mr. Miller proposed but subsequently did not press that the agreement which would come from these negotiations would contain a reopener in the second year of the agreement to deal specifically with the reserve clause because he recognized as well as we that the proposal we were dealing with was not a specific proposal, and then subsequently he reasoned that the problem—

Mr. Topkis: He stated.

A. He stated that the problem could be best approached if both parties did so with the greatest degree of objectivity possible, and consequently proposed that following the negotiation of the basic agreement the parties enter into a joint review or joint study of possible [1585] alternatives or changes in the reserve system. And the parties did so agree and they memorialized that agreement in Article 8 of the basic agreement which appears at Page 4 of that agreement.

The Court: And that refers in turn to which exhibit? When you say "basic agreement," you mean—

Mr. Hadden: Defendant Feeney Exhibit F, your Honor.

The Court: Right?

The Witness: Yes, Judge.

The Court: We will take a short recess. You may not think much of this, but I would like to have more detailed testimony as to dates, action by management with respect to Page 5 of Exhibit O. In other words, when management was confronted with it, I would like to have more details of how much consideration was given. I take it there was no flat rejection of it. Just approximately what dates, what time, what amount of consideration was given to it.

Mr. Hadden: Very well, your Honor.

The Court: Short recess.

The Clerk: Short recess. All rise.

(Recess.)

The Court: Mr. Hadden, I don't want to add to [1583] your burden, but there is another point that suggests itself to us: Does Article 8 of the basic agreement whereby the parties agree to undertake a joint review of the reserve system, did it precede or follow the order of the NLRD asserting jurisdiction over baseball?

By Mr. Hadden:

Q. Do you know the answer to that question, Mr. Gaherin? A. It preceded.

The Court: Next question.

Q. Mr. Gaherin, you heard the Judge's inquiry just prior to the recess which, if I may paraphrapse it, was as to whether or not you could give further detail as to the deliberations, discussions, negotiations which took place with reference to the portion of the Exhibit O, the July 28, 1967, statement of policy which I read and which negotiations led to the adoption of Article 8 of the basic agreement.

A. Your Honor, I am lax on dates, perhaps, but I will try to say what our conclusions were and what our thoughts were concerning this situation.

We had a proposal from the Association which we entertained as part of their request which was more philosophical than a specific demand for amendment to [1587] a certain extent. It highlighted certain underlying faults with the system, as they saw it which they thought cried for correction. To what extent and in what manner was not evident.

So the Association, us, together, we agreed that we would create a machinery, the joint review, with the hopes that from this machinery would evolve (a) is there need for change; (b) to what extent should it be changed; (c) how do you go about it. Sitting in a calm atmosphere not as adversaries but as co-journeymen wandering through this

very difficult situation, that is how we approached it and that is how this review thing came into being.

Q. Mr. Gaherin, in connection with the negotiations which led to the basic agreement and having in mind the fact that the NLRB had then not yet asserted jurisdiction over organized baseball, did the clubs in their discussions and negotiations with the Association ever claim that the reserve system was not a subject of bargaining? A. Oh, no.

Q. And to the extent that it led to the adoption of Article 8, did the clubs in fact bargain with the Association on the reserve system? A. Yes, sir.

Q. Did the first basic agreement contain any [1588] provisions apart from Article 8 by means of which the Association consented to the provisions of the reserve system as then constituted? A. Yes, sir.

Q. Would you tell the Court what those provisions of the basic agreement and exhibits thereto were? A. May I refer to the agreement?

The Court: He wishes to refer to the agreement. By the agreement, you mean Exhibit—

The Witness: Exhibit F.

A. At Page 1 of Exhibit F, Article 2, Uniform Player's Contract, the parties agreed to the inclusion of the Uniform Player's Contract into and became a part of the basic agreement. The Uniform Player's Contract embodies the commitment of the players and its clubs to obligate themselves to the major league agrements, major league rules. The entire reserve system flowed into the agreement.

Q. That would include, I take it, the assignability clause and the clause giving the clubs the right to exercise a right of renewal of players' contracts? A. Yes, sir.

Q. Were there any other discussions of the reserve system during the negotiations leading to the first basic agreement? [1589] A. Well, yes.

Q. What were they? A. Again this Article 2, and specifically the last sentence of that article—

Q. I will read that so the Court will have the language before it.

The Court: Thank you.

Q. The sentence is: "The termination of this agreement shall not impair, limit or terminate the rights and duties of any club or player under any contracts between any individual player and any of the clubs."

Now would you continue your answer, Mr. Gaherin. A. The purpose of that, your Honor, was to document the understanding of the negotiators of the agreement that the demise of the basic agreement would in no way whatsoever affect the Uniform Player's Contract or any of the prerogatives of the contract, including the right of renewal. It is freely conceded by the organization, the Association, we could renew these contracts even if this agreement were not in effect.

Q. When did the first basic agreement terminate? A. May 5—excuse me. April 5th of this year.

Q. Are you certain about that? A. The first basic agreement?

[1590] Q. Yes. A. This is the first basic agreement?

Q. Yes. A. It terminated this year. It terminated in April of this year by an agreement of the parties.

Q. Was it at or about the time when the season started? A. Yes.

Q. And well after spring training? A. Yes.

Q. In those discussions which you have just described, did the Association's representatives make any statements to the clubs' representatives with regard to the last sentence of Article 2 in which they stated what their intentions were with regard to the bringing of any suit? A. Yes, they did.

Q. What did they say? Who was it? A. It was Mr. Miller.

Q. What did he say?

Mr. Topkis: Could we know when, your Honor?

The Court: Yes, as closely as you can fix it, Mr. Gaherin.

The Witness: May I ask a question?

The Court: If you think you have to, yes.

[1591] The Witness: Are we looking for a specific date?

Q. As best you can recall, I take it your answer must re-

fer to some statement made during the course of the first basic agreement negotiations? A. It was during the discussion of the basic agreement, the first basic agreement, and during the specific period of those negotiations, it was during the construction of what is now Article 2, and Mr. Miller and Mr. Moss, too, for that matter, said that it was not their intention during the life of this agreement to test its legality by a suit in a court of law.

Q. Do you know when this suit was started? A. This present suit?

Q. Yes. A. January—the middle of January, between the 15th and 19th, of January of this year.

Q. Following the adoption of the first basic agreement, when did the reserve system next become the subject of any formal discussions with the Players Association? A. When we entered upon the joint study procedure that we had agreed upon.

Q. And approximately when was that? [1592] A. April of last year.

Q. If I may interrupt this line of questioning, Mr. Gaherin, you gave an answer just prior to the recess with reference to the approximate money value of the clubs' relinquishment of the clubs' 10 per cent expense money with reference to the first three games of the playoffs.

You said that your estimate of that amount was $250,000. Do you wish to correct your answer? A. Yes. 10 per cent would be about $140,000.

[1593] Q. Thank you. Now, turning again to the joint study, will you describe for the Court what discussions took place with the Players Association and what was said, in substance? A. Well, your Honor, the proceeding, of course, was informal. We met on various occasions, either in Mr. Miller's office or in mine. Generally it was Mr. Miller and Mr. Moss, sometimes a player representative. I was accompanied by counsel for the leagues and we had a free-wheeling, in depth exploration of all the phases of what has become known as the reserve system.

This, of course, was not a forum in which proposals were made, but ideas were thrown out. I would say, in candor, that many of these ideas have subsequently been converted into proposals by the Association.

Q. Were any proposals of any sort made by the Association during the course of the joint study? A. As proposals, no. As suggestions of possibilities of answers, yes, they talked—well, we talked; for example, one of the things we talked about was the so-called football option thing, but it wasn't something that the Association at the time thought had a great deal of merit or applicability to our situation and it sort of got dropped.

Q. Did the Association at any time during the course [1594] of the joint study say, in effect, to the clubs, "This is a change we would like to have and we ask you for it"? A. No.

Q. Approximately how many meetings were held with reference to the joint study? A. Total, probably five, six.

Q. What reactions were expressed by the clubs, in substance, to the various suggestions which the Association had mentioned? A. Well, we explored each suggestion that was put into the proceeding. We explained from our point of view why we felt that they lacked merit or lacked applicability to our particular situation.

Q. Would it be a fair statement that the reasons which were presented by the clubs were of the sort which have come from the testimony of witnesses in this court on behalf of defendants? A. Yes.

Q. And how did the joint study conclude? A. Well, the joint study terminated without the parties being able to recommend to their people a solution other than the system as it is now in existence and—well, that's how it ended.

Q. Did the clubs suggest to the Association or invite [1595] it to submit a formal proposal? A. Yes. We said that if their interest was in change—we were then approaching the threshold of the new negotiations—it would be appropriate for them to submit to us the specific changes

that they wanted us to consider and we would give them the most profound consideration.

Q. Did the Association's representatives express themselves in any way at the conclusion of the joint study as to the utility or usefulness of the joint study? A. Well, I think, again, Judge, in candor, there was some disappointment that out of the joint study there hadn't evolved a pattern that we could both propose, but I think they recognized that it had given us an opportunity in a relatively calm atmosphere, without the atmosphere of advocating anything, to explore the whole problem, and they were appreciative, as were we, to have the benefit of their thinking in such candor as came out in that study.

Q. And after that, sir, did there come a time when a proposal in writing was received from the Association to open the new negotiations? A. Yes, that was in August of last year.

(Defendant Feeney et al. Exhibit P marked for identification.)

Q. Mr. Gaherin, I hand you what has been marked [1596] Defendant Feeney et al. Exhibit P for identification, and I ask you whether that is the document that you referred to? A. Yes, it is the one.

Q. Thank you. Keep that, if you will, And is that a document entitled Proposed Amendments and Additions to Basic Agreement of February 19, 1968, to which is attached a covering letter from Mr. Miller to you, dated August 29, 1969. A. It is.

Mr. Hadden: I offer the exhibit in evidence, your Honor.

Mr. Topkis: A moment, your Honor, please.

The Court: Surely.

(Pause.)

Mr. Topkis: No objection, your Honor.

(Defendant Feeney et al. Exhibit Preceived in evidence.)

Q. Was there in that paper, Mr. Gaherin, Exhibit P, any provisions with reference to the reserve clause? A. Yes.

Q. And where do you find it, sir? A. You will find it beginning at the bottom of page 1 and following over on page 2.

Mr. Hadden: Your Honor, may I read this into the [1597] record?

The Court: Please do.

Mr. Hadden: The caption of that section is Reserve Clause and Related Rules, and then there is a paragraph:

"Replace with alternative provisions. Such provisions shall be:" and there is an itemized list.

"1. Legal and constitutional;

"2. Reasonably required to maintain the integrity of the game; and

"3. Responsive to the legitimate interests of the club owners with respect to their investment and equity in baseball franchises and at the same time shall provide the players with the normal rights of other people in a competitive free enterprise economy."

Q. Following the receipt of this document, Mr. Gaherin, did the parties undertake negotiations? A. Yes, they did.

Q. Were there other proposals contained in the document covering subjects other than the reserve system? A. Yes, there were.

Q. And would it be fair to say that the proposals embraced all of the subjects which you have testified to earlier and which became changes in the new basic agreement? A. Yes, Mr. Hadden.

[1598] Q. Would it be a fair statement, Mr. Gaherin, that adjustments were made in the new basic agreement in substantially every one of the itemized lists in this Exhibit P during the course of the negotiations? A. Yes.

Q. Will you describe what negotiations took place with reference to the reserve system? A. Well, the reserve system, as part of these negotiations, was discussed intermittently during the negotiations, and we at all times pointed out that the proposal which you have read into the record was not specific. It was something you could not bite into, come to grips with, and we continued to urge that in order

that this could be given the consideration that it merits, that if the Association was going to pursue it, diagram the changes you want, let's look at them, let's be able to evaluate them in their totality.

Q. And did the Association do that? A. Not for quite a while. Eventually the Association—may I refresh my memory, your Honor?

The Court: Surely.

A. Finally the Association came forward with a proposal—

Mr. Hadden: Would you hold it a minute, Mr. Gaherin.

May I have a moment, your Honor?

[1599] The Court: Yes, by all means.

(Pause.)

Mr. Hadden: Would you read the witness' answer, Mr. Court Reporter? Judge, may I have it read?

The Court: Of course. Would you, please, Mr. Court Reporter.

(Answer read.)

Q. Continue your answer, Mr. Gaherin. A. —which did contain specific proposals, very drastic revisions. Basically they proposed a free agency status for any, as I recall it—I don't have the paper in front of me—free agent status for any player after three years. It provided for a reduction in the number of players that could be reserved by the club. It provided for salary arbitration. It provided for a bar against transfer of contracts without the consent of the person being transferred. It provided for a change in the definition of what is known at the veterans status.

I think that that is a fair characterization of what was in there.

Mr. Topkis: If your Honor please, on the voir dire, might I inquire whether this proposal was in writing, and if so, might the writing be produced?

The Court: That is a suggestion to counsel.

[1600] Mr. Topkis: Yes.

The Court: Yes.

Q. The proposal was in writing, was it not? A. Yes, it was.

Mr. Hadden: I thought we had copies of it available, your Honor, but I seem to have mislaid it. I wonder if we might have permission to obtain a copy of it and introduce it into evidence whenever I can lay my hand on one.

The Court: Yes, indeed.

You are now handing a paper to the witness which will be considered as Exhibit Q for identification until the clerk comes back to so endorse it.

Q. I hand you a document which will be marked for identification Exhibit Q, Mr. Gaherin, and ask you if you are familiar with that paper. A. Yes. This intervened between.

Q. Do you have a copy of that among the papers you have here on the witness stand? A. I think I do, yes.

Q. Do you have it before you? A. Yes.

Q. What is that paper, sir? A. It is a paper which I have noted was received on June 27, 1969, on the stationery of the Major League Base- [1601] ball Players Association, and it is headed Joint Study of the Reserve Clause.

Q. Mr. Gaherin, in what connection was that received by the Player Relations Committee? A. It was received as part of the material that was introduced into the study by the Association's representatives.

(Plaintiff Feeney et al. Exhibit Q marked for identification.)

Mr. Hadden: I would like to offer the exhibit in evidence. I assume Mr. Topkis is reviewing it to see what his reaction is.

Mr. Topkis: One moment, if I may.

(Pause.)

Mr. Topkis: Just so the record may be clear, your Honor, may I inquire in the voir dire?

The Court: Yes.

Voir Dire Examination by Mr. Topkis:

Q. Mr. Gaherin, I gather this was a document that was supplied to you during the joint study, is that right, Exhibit Q for identification? A. Yes, that's correct.

Q. This is not the document containing proposals? A. It is not.

Mr. Topkis: I have no objection to it, your Honor.

[1602] The Court: It is received. Would you be good enough to mark it in evidence, Mr. Clerk?

The Clerk: Yes, your Honor.

(Defendant Feeney et al. Exhibit Q received in evidence.)

By Mr. Hadden:

Q. Mr. Gaherin, what was the purpose for which that paper was sent to the Player Relations Committee?

The Court: Q in evidence.

Q. Q in evidence, yes.

Mr. Topkis: If your Honor please, I would suggest that that question be better addressed to the man who sent it rather than Mr. Gaherin.

The Court: Sustained.

Q. What did you understand the purpose was that this paper was to serve, Mr. Witness?

Mr. Topkis: I object to that, too, your Honor. There is no question, it was produced in the course of this joint study, furnished to the other side by the Players Association.

The Court: I will allow it. Overruled.

What is your answer?

A. Well, the purpose of the paper was again to, in general terms, highlight the problems of the reserve system as the Players Association representatives saw them.

[1603] Q. Mr. Gaherin, I will ask you to turn to the second page of that document and I will ask you whether, in the material that appears in the first three paragraphs on Page 2, there was not a request made by or it was not pointed out by the Players Association that there was a

lack of bilaterial obligation in the contract, Uniform Player Contract? A. Yes.

Mr. Topkis: Objection, your Honor. The document is in evidence and, of course, speaks for itself.

The Court: Yes.

Mr. Hadden: Your Honor, I can read these three paragraphs and it will take 15 minutes or I can shorten it by trying to summarize it.

Mr. Topkis: I have no objection to Mr. Hadden summarizing it.

The Court: All right.

Q. And what is the fact, Mr. Gaherin, as to whether changes were negotiated with the Association in the recently concluded negotiations with reference to that matter? A. The imbalance?

Q. Yes.

Mr. Topkis: Objection, your Honor. If the new document, the new basic agreement has provisions dealing [1604] with this subject, then it is in evidence and it speaks for itself.

Mr. Hadden: May I direct the witness' attention to a specific sentence in the paper, your Honor?

The Court: Surely.

Q. I will ask you to look, Mr. Gaherin, at page 2, the first full paragraph, about two-thirds of the way down there is a sentence that starts: "If the contract is terminated in the off season and prior to the training season, the club has no financial obligation. If terminated during the training season, the club's only financial obligation is to provide appropriate traveling expenses to the player's home. If terminated during the championship season, the obligation of the club is limited to 30 days' pay and appropriate traveling expenses to the player's home."

That is the end of the quotation.

Have changes been made in the course of the recently concluded negotiations on the subject matter treated there? A. Yes, sir.

Q. I think you previously described them. A. Yes, I did.

Q. I will ask you to turn to the top of Page 4, Mr. Gaherin, of Exhibit Q and I will read into the record Paragraph 2 at the top of the page:

[1605] "Player management salary discussions are limited by management at to, on the one hand, a player, most often relatively young and inexperienced in business affairs and contract negotiations, and on the other hand, an experienced club official with considerable background in business matters and usually a veteran of many hundreds of contract negotiations."

Was a change negotiated in the basic agreement in response to that suggestion? A. Yes, sir.

Q. And what was that change? A. That a player may be accompanied by a representative of his own choosing if he so desires when he is negotiating his individual contract with the club.

Q. Thank you. I will ask you to turn to the bottom of Page 5——

Mr. Topkis: If your Honor please, I see no reason for us to continue this summation. The two documents are in evidence. If Mr. Hadden wants to call to your Honor's attention the points at which the various provisions in this document, Exhibit Q, were acted on in the second basic agreement, I don't object, but what is the point in dragging it out of the witness?

The Court: Well, I——

[1605] Mr. Hadden: Your Honor, if Mr. Topkis finds it painful, I will be glad to pass to another subject.

Mr. Topkis: I am not painful. I am just bored.

The Court: It looks as though I am not called upon to say anything in the light of this exchange.

Q. Returning now, Mr. Gaherin, to the subject of the negotiations this past fall, what followed the receipt of the paper which you have described, and which we will have a copy of shortly, in the course of the negotiations? A. Well, let me try and put this in the context in which it occurred. The paper to which I referred came on the table in our

urging for specifics before the end of the year and before the winter meeting of the clubs.

[1607] Q. When were those held? A. In December.

Q. Of 1969? A. 1969. At those meetings, your Honor, we reported the status with respect to the status of the negotiations and insofar as this subject was concerned explained the——

MR. TOPKIS: Objection, your Honor, at this point. I want to interrupt in order to protect the record. We weren't at this meeting and the testimony is, I think, hearsay.

Q. Mr. Gaherin, perhaps we can shortcut that. Will you tell the Court, please, what transpired across the bargaining table? A. Across the bargaining table, when we resumed our meetings in December after the receipt and consideration of this proposal, we told the representatives of the Association we had given very careful and very thorough consideration to this, had conferred with our principal, and we were indeed shocked by the extent of these proposals and the obvious harm that the adoption of them would do to the game of baseball.

Q. What transpired after that? A. Well, the negotiations rocked along then into January.

[1608] Q. Were a large number of other subjects also under discussion? A. And if I may, there is something that really, I think, needs to be said, if I am permitted to say it.

Q. Go ahead. A. We had an extensive proposal before us. It was in the four corners of the compass. It dealt with a request for a reduction in the number of games that would be played in the season. There was a pressing need to get that resolved because while we were negotiating the season was nevertheless getting a day closer each day that we met. We had to find some answer to that. We urged that as the first order of business. We weren't successful. We were dealing with a package, Mr. Miller said, all things lining up, and what you do in one area plus what they would be willing to do in another.

We had the problem of the minimum salary. As I ex-

plained, Judge, previously we had this terrible problem of the grievance procedure that was pressing us.

Mr. Topkis: If your Honor please, may the witness be directed to avoid this editorializing?

The Court: Yes. If you can, avoid giving us your reaction to it or summing up, "terrible," words like that. A. We had the problem of the grievance procedure, [1609] we had the question of reducing the maximum permissible cut allowed in the salaries, and all these things were all on the table at one time, and they were all part of the bargaining. And finally, we did sort of get to a point where the question of the number of games, if everything else fell into place, going to be played was put to one side and then we moved to the next problem, which is the grievance procedure and this matter we are talking about.

The Court: By that you mean?

The Witness: The reserve system. A. And then we were now approximately in mid-January.

Q. Let me interrupt you a minute there, Mr. Gaherin. When did you as a representative of the clubs first learn that there would be or might be a suit brought by Mr. Flood? A. Well, I don't know the precise date the executive board met in Puerto Rico. It was approximately at the same time that the winter meetings were held by the leagues.

And following that meeting we became aware of the fact that Mr. Flood had appeared before the board and discussed the matter with them and subsequently Mr. Miller informed us that there was a possibility there [1610] was going to be a lawsuit. And then the most positive recollection of it is the fact I was served with a subpoena in my office during the time that we were engaged in negotiating or attempting to negotiate something on the reserve clause and all the other matters that were involved.

Q. That is, you were served with a summons, I take it? A. A summons. There was a lot of legal paper there.

Q. You were served with a summons which designated

you as an agent for the major 24 major league clubs, is that correct? A. Yes, sir.

Q. And that was, as you say, in the middle of January? A. Yes, and right in the midst of a collective bargaining session.

MR. KRAMER: Your Honor, before——

THE COURT: The Court recognizes Mr. Kramer?

MR. KRAMER: Thank you. Before we go too far, I would like to have the next to the last answer read back, if your Honor would permit.

THE COURT: Certainly. Would you kindly do [1611] that?

MR. KRAMER: I may have been mistaken. It is a long one.

(Record read.)

MR. KRAMER: It is the word "board" in that answer that is meaningless to me.

THE WITNESS: The executive board of the Players Association.

MR. HADDEN: Do we have a pending question?

THE COURT: Would you try to locate it, Mr. Court Reporter, please.

THE REPORTER: There is no unanswered question.

Q. Did the institution of this litigation have any effect on the position of the clubs with reference to the negotiations on the reserve clause as those positions were expressed across the bargaining table?

MR. TOPKIS: Your Honor, I rise reluctantly, but Mr. Hadden modified his question as he saw me start to rise. I would have no objection to the witness being asked: Did you make a statement subsequent to being served with this summons in subsequent negotiations with the players' representatives.

MR. HADDEN: I submit the question as phrased is entirely proper, your Honor.

[1612] THE COURT: Objection overruled. Listen to the question, Mr. Gaherin.

(Question read.)

A. Yes.

Q. What was the position as expressed across the bargaining table? A. We were—we advised the Association that we were confronted by two efforts of theirs which had diametrically opposite goals. We were bargaining in collective bargaining on the assumption that the goal of the Association was to seek to amend the existing reserve system. We were confronted in Mr. Flood's action, joint action, that by prayer to destroy it. This made a very difficult atmosphere in which to try to bargain. You were in the position of trying to ride two horses galloping in opposite directions.

Q. So what position did the clubs express with relation to the reserve system and what was the response of the Players Association? A. Well, we said if the Association had chosen to pursue the question of whether the clause was in effect a legal situation, then let's find that out and once that is disposed of resume from wherever that puts us. [1613] Q. Was any understanding reached with the Association concerning the reserve clause? A. Yes, there was. We had considerable discussion. The position of the Association was basically, and I think so stated by advice of counsel, that if they included the reserve clause, amendments to the reserve clause, in the framework of this agreement we were attempting to put together, they were going to perhaps do irreparable damage to this action that is before your Honor.

We proposed originally that we'd wait until the end of the contract term before this was resumed. We finally reached an agreement which is part of——

(Mr. Kramer hands document to witness.)

A. That is Feeney Exhibit N.

Q. What portion of Exhibit N was the agreement expressed in? A. It is in Attachment B.

Mr. Hadden: Your Honor, may I read a portion of that into the record?

The Court: Thank you.

MR. HADDEN: Attachment B to the understanding is this: It is titled "The Reserve System."

"Regardless of any provision herein to the contrary, this agreement does not deal with the reserve [1614] system. The parties have differing views as to the legality and as to the merits of such system as presently constituted. This agreement shall in no way prejudice the position or the legal rights of the parties or of any play regarding the reserve system.

"It is agreed that until the final and unappealable adjudication (voluntary discontinuance) of Flood versus Kuhn, et al, now pending in the Federal District Court of the Southern District of New York, neither of the parties will resort to any form of concerted action with respect to the issue of reserve system and there shall be no obligation to negotiate with respect to the reserve system. Upon the final and unappealable adjudication (or voluntary discontinuance) of Flood versus Kuhn, et al, any party shall have the right to reopen negotiation on the issue of the reserve system as follows," and that is the end of the quotation, your Honor. The provisions that follow are a timetable for negotiations.

THE COURT: Yes, sir.

Q. What do you understand, Mr. Gaherin, to be the effect of that provision which I have just read? A. It puts the matter in limbo until the action here is disposed of in some form.

Q. In the course of the negotiations, have the [1615] clubs made any statements to the Players Association explanatory of their reasons for being willing to adopt that procedure? A. Yes.

Q. What did they say? A. We said that we think the only proper forum for dealing with this situation is in the give and take of collective bargaining, but since we are involved here let's have this over with and then we'll be ready and prepared to go on across the table.

Q. In your judgment as a labor negotiator of long ex-

perience, Mr. Gaherin, is the collective bargaining process well-suited to the resolution of an issue of this sort?

MR. TOPKIS: Objection, your Honor.

THE COURT: Would you like to be heard on that?

MR. HADDEN: I think the question is entirely proper. I qualified the witness as an expert, your Honor.

THE COURT: I agree with you. Objection overruled.

A. I think——

THE WITNESS: May I have the question again, sir?

THE COURT: Yes, certainly.

[1616] (Question read.)

A. Yes, sir.

Q. Will you tell the Court why? A. Well, your Honor, collective bargaining is not a precise science. You deal in the areas of the shadow, the give and take of compromise, each side motivated by whatever the pressures are. Each of us know more intimately than anybody else can ever know what this problem is, what all the ramifications and complications are of the things we suggest to one another, and we have the—I don't know if expertise is the proper term, but we certainly have all of the ability in the two sides to sit down and in the free arena of collective bargaining resolve a matter of this nature.

And I may say parenthetically, if I may, Judge, we are quite willing to do so.

Q. Perhaps it has been covered, but if it has not, Mr. Gaherin, do the clubs recognize the reserve system satisfactory as a mandatory subject of bargaining? A. Oh, yes.

THE COURT: Mr. Hadden, possibly unbeknownst to you, your voice must be raised a little bit. There are some young ladies and gentlemen from the Chappaqua high school who have come here and I am sure they are disappointed [1617] that neither the witness, you, nor the Judge are Curtis Flood or Hank Greenberg, so we have to kind of make it up to them a little bit.

Would you be good enough to raise your voice?

MR. HADDEN: I certainly shall, your Honor. If we can even brighten their day as much as they brighten ours, I would be happy.

Q. Again, Mr. Gaherin, based on your years of experience in labor negotiations, is the collective bargaining mechanism or machinery which now exists in major league baseball a reasonably effective one? A. Yes.

Q. Has the Association, in the course of the bargaining of the new basic agreement, accused the management representatives of not bargaining in good faith on the reserve system? A. They have.

Q. And what has been the rejoinder? A. That we have bargained sincerely in good faith and in the context of collective bargaining the whole picture. If I may describe it, you put piece by piece together and you weigh the value of one against another and finally you get the totality of an agreement, and we have bargained in good faith. Simply because a party [1618] says, "I won't give you this, but I am prepared to do something here and here and here," does not mean it is not bargaining in good faith. It is collective bargaining. It is the balancing of one thing against another, one consideration against the other. Repeatedly in these negotiations we have been told: "What you do here is going to influence what we are willing to do there."

It is understandable, agreeable, and we have bargained in good faith.

Q. Is it a fact, Mr. Gaherin, that in the recently concluded negotiations changes have been made in various aspects of the reserve system? A. Yes, sir.

MR. HADDEN: Your Honor, may I have a moment?

THE COURT: Surely.

(Pause.)

MR. HADDEN: No further questions, your Honor.

THE COURT: Would you mind, Mr. Hadden, a suggestion? You may adopt it or reject it, as you deem best. I would like to get this witness's reaction as an expert in the field as to whether or not the challenges and the difficulties and the

give and take and all the elements that come into existence in the course of such negotiations are heavier, more insurmountable than those [1619] he has experienced in the course of his career when he was confronted with difficulties of a similar nature.

MR. HADDEN: I would be glad to have him answer that question, your Honor.

Q. Would you do so, Mr. Gaherin? Do you understand what the Judge asked? A. I am not sure I do, Judge.

THE COURT: I hope you do, Mr. Hadden.

Q. I think what his Honor has in mind, and please correct me if I am wrong, do you feel qualified to express an opinion as to whether, having in mind your long experience with other industries, the types of problems which are confronting the major league clubs in the labor area are tougher ones or easier ones than has been the general course of your experience? A. Well, they are probably more difficult at this point because the industry is rather new to the process of collective bargaining. We have a ripening relationship with the Association which will improve our position. So I think at the moment probably, Judge, we have a more difficult situation than most.

THE COURT: Is it your testimony that nevertheless as you envision it, the possibilities are quite strong that it might be resolved?

[1620] THE WITNESS: Yes. I think all problems are resolvable but I can't propose the solutions. I think the parties, in my judgment, are always the best judges of what they should live with, and how they reach that understanding is quite another matter.

THE COURT: You bear in mind, do you, the well-pronounced experience in the law that a contract is no stronger than the good faith of the parties thereto; you recognize that, do you?

THE WITNESS: Yes, I do, Judge.

THE COURT: And you think that is indispensable, I take it, that quality, in connection with this bargaining process that has been going on?

THE WITNESS: Yes.

THE COURT: All right.

BY MR. HADDEN:

Q. Have the clubs, in your view, negotiated in good faith? A. Yes, sir.

Q. Is it your view, Mr. Gaherin, that provisions—that changes in the reserve system, if any are to be adopted, can better be fashioned in the give and take of collective bargaining than in the somewhat different arena we are presently in? [1621] A. Yes, sir.

MR. HADDEN: Thank you.

THE COURT: I am not commenting on the answers, but that is the type of testimony I was anxious to obtain.

* * *

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD, *Petitioner*,

v.

BOWIE K. KUHN, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions	3
Statement of the Case	3
Reasons for Granting the Writ	9
I. The court below frankly conceded its own inability properly to dispose of this case	9
II. The time has come to subject Organized Baseball's reserve system to scrutiny under the federal antitrust laws	9
III. The court below ignored controlling decisions of this Court in failing to apply state antitrust law to Organized Baseball's reserve system	13
IV. Organized Baseball should not be allowed to maintain, under the imprimatur of this Court, in one forum after another that "some other forum" is the appropriate one to deal with the abuses of the reserve system	19
Conclusion	20

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Bibb v. *Navajo Freight Lines*, 359 U.S. 520 (1959) ... 15
Blonder-Tongue Labs. v. *University Foundation*, — U.S. —, 39 U.S.L.W. 4506 (May 3, 1971) 12
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Page

Commonwealth v. *McHugh*, 326 Mass. 249, 93 N.E.2d 751 (1950) 18
Federal Baseball Club v. *National League*, 259 U.S. 200 (1922) 2, 7, 8, 9, 10, 13
FTC v. *Dean Foods Co.*, 384 U.S. 597 (1966) 12
Giboney v. *Empire Storage Co.*, 336 U.S. 490 (1949) ... 8
Haywood v. *National Basketball Ass'n*, 401 U.S. 1204 (1971) 11
Head v. *New Mexico Board of Examiners*, 374 U.S. 424 (1963) 17
Helvering v. *Hallock*, 309 U.S. 106 (1940) 13
Huron Portland Cement Co. v. *City of Detroit*, 362 U.S. 440 (1960) 14
Lear v. *Adkins*, 395 U.S. 653 (1969) 11
Meat Cutters v. *Jewel Tea*, 381 U.S. 676 (1965) 21
Moragne v. *States Marine Lines*, 398 U.S. 375 (1970) 2, 9, 12
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 15, 16
Radovich v. *National Football League*, 352 U.S. 445 (1957) 4, 10, 21
Salerno v. *American League*, 429 F.2d 1003 (2d Cir. 1970), cert. denied sub nom. *Salerno* v. *Kuhn*, 400 U.S. 1001 (1971) 9, 10
Simpson v. *Union Oil Co.*, 396 U.S. 13 (1969) 11
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) .. 16
Teamsters Union v. *Oliver*, 358 U.S. 283 (1959) 21
The Boys Markets, Inc. v. *Retail Clerk's Union*, 398 U.S. 235 (1970) 12
The Harrisburg, 119 U.S. 199 (1886) 9, 12
Toolson v. *New York Yankees*, 346 U.S. 356 (1953) 2, 7, 8, 9, 10, 11, 12, 13, 15, 19
United States v. *International Boxing Club*, 348 U.S. 236 (1955) 10
United States v. *Women's Sportswear Mfr's Ass'n*, 336 U.S. 460 (1949) 21
Wisconsin v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 590 (1966) 15, 20

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const, Art. I, Sec. 8 ..... 46a

15 U.S.C. § 1 ..... 46a

15 U.S.C. § 3 ..... 46a

Cal. Bus. & Prof. Code, § 16600 ..... 46a

Mich. Ann. Laws § 28.62 ..... 46a

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21 Cong. Rec. 2457, 51 Cong., 1st Sess. (1890) 17

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Note, 61 Colum. L. Rev. 1469 (1961) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

CURTIS C. FLOOD, *Petitioner*,

v.

BOWIE K. KUHN, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Curtis C. Flood prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 7, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is not yet reported. The opinion of the District Court (Appendix B) is reported at 316 F. Supp. 271 (S.D. N.Y. 1970).

JURISDICTION

The Court of Appeals entered judgment (Appendix C) on April 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Finding itself in "a most frustrating predicament," and blaming the "vagaries of fate," the court below confessed it was helpless to decide this case properly. Accordingly, it declined to determine the lawfulness of Organized Baseball's "reserve system" under either federal or state antitrust law. On the one hand, the Second Circuit felt "compelled" to follow *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922) and *Toolson* v. *N. Y. Yankees*, 345 U.S. 356 (1953)—the concededly anomalous decisions of this Court which held that Organized Baseball is not "interstate commerce." On the other hand, the Second Circuit rejected petitioner's state law claims for precisely the opposite reason—that Baseball *is* "interstate commerce" and somehow entitled to immunity from state antitrust regulation.

The questions presented are:

(1) Should not this Court, in the exercise of its supervisory power, rectify this bizarre result and thus preserve "public faith in the judiciary as a source of impersonal and reasoned judgments," *Moragne* v. *States Marine Lines*, 398 U.S. 375, 403 (1970)?

(2) Have not subsequent decisions of this Court, and developments in professional sports, so undermined *Federal Baseball Club* and *Toolson* that they may no longer shield Organized Baseball's reserve system from the federal antitrust laws?

(3) Even assuming *Federal Baseball Club* and *Toolson* are to stand, may Organized Baseball be insulated from all state antitrust regulation, thus creating a unique "no-man's-land"?

(4) May the federal courts curtail the reach of all state antitrust statutes on a wholesale basis, without

conducting any "particularized inquiry" into the nature of the statutes or their impact upon interstate commerce, and with no finding that they violate any federal constitutional provision, or conflict with any federal statute or with one another, or intrude into an area which Congress has affirmatively found should be free of state antitrust regulation, or discriminate against interstate commerce?

(5) May Organized Baseball continue successfully to maintain:

(a) to the courts: that only Congress can correct the abuses of Baseball's reserve system;

(b) to the Congress: that the courts are adequate and legislation unnecessary;

(c) to proponents of federal regulation: that state regulation suffices; and

(d) to proponents of state regulation: that federal regulation alone may be applied?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The applicable constitutional and statutory materials are set out in Appendix D.

STATEMENT OF THE CASE

1. The Complaint

Petitioner brought this action in the United States District Court for the Southern District of New York on January 16, 1970 to challenge the legality of Organized Baseball's "reserve system," the archaic scheme which binds every American professional baseball player to one team, or its assignee, for life.

His suit arose out of the October 1969 "trade" by which the St. Louis Cardinals—for whom he had played for twelve years as a star centerfielder and frequent

.300 hitter—abruptly sent him to the Philadelphia Phillies. Despite his long service, his position as Cardinal co-captain, and his deep business and personal roots in St. Louis, he had not been consulted about the trade; his "owner" told him about it only after the fact.

Petitioner filed suit after the Commissioner of Baseball denied his request that he be made a "free agent," at liberty to seek employment with other teams. Petitioner focused his attack on Organized Baseball's interrelated set of rules and agreements which forced him—at age 32—to choose between playing baseball for Philadelphia and abandoning his highly successful career.[1]

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[1] Despite the offer of a lucrative salary and his awareness of the physical toll such a decision would wreak at this stage in his career, petitioner out of conviction declined to play for Philadelphia, and accordingly missed the entire 1970 season. During the pendency of the appeal below, Philadelphia sold its exclusive right to negotiate with petitioner to the Washington Senators. By agreement among the parties to this litigation, petitioner's decision to accept Washington's terms for the 1971 season was without prejudice to this case. Events showed, however, that the year's forced layoff had eroded petitioner's skills. He left the team and is not now playing in Baseball.

Wholly apart from the parties' agreement, these events do not moot this case, in which petitioner seeks treble monetary damages. The success of the boycott, after all, cannot insulate it from judicial scrutiny. See *Radovich* v. *National Football League*, 352 U.S. 445 (1957), where the complainant was able to obtain judicial relief from professional football's reserve system after a protracted boycott had ended *his* career. Like Radovich, petitioner has been sorely damaged by the group boycott complained of, having lost his total salary for 1970 of over $100,000 and suffered impairment of his career. He is entitled to dissolution (or domestication) of the reserve system and to compensation. Moreover, the vast majority of petitioner's fellow players have a stake in the outcome of this case, for they continue to bear the brunt of the system.

Petitioner filed an action against the twenty-four major league teams comprising both major leagues, the presidents of the two leagues, and the Commissioner of Baseball. Count I of the complaint charged that defendants violated the federal antitrust laws by their reserve system and their insistence that petitioner play baseball in Philadelphia or nowhere. Count II, based on diversity of citizenship and naming eleven defendants, asserted that the reserve system and defendants' boycott violate the antitrust laws of New York, California and other states, as well as civil rights statutes. Count III, which named thirteen defendants, asserted that the reserve system and the boycott violate the common law.[2]

Plaintiff seeks a declaration that the reserve system is unlawful, an injunction against the boycott, and triple the monetary damages he has sustained since December 30, 1969.

2. The Trial

The reserve system was shown at trial to be a closely interrelated set of agreements and provisions which uniquely restrict player freedom. For example, Major League Rule 3(a) requires every player to sign a Uniform Player's Contract. The evidence showed that the Commissioner of Baseball has *never* permitted deviation from the imposed terms of that contract. Section 10(a) of the Contract provides that if a player does not sign with the club which had his last contract by

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[2] Count IV charged thirteen of the defendants with imposing upon petitioner a form of peonage and involuntary servitude proscribed by 42 U.S.C. § 1994, 18 U.S.C. 1581, and the Thirteenth Amendment to the United States Constitution, as well as depriving him of his "freedom of labor" in violation of 29 U.S.C. §§ 102 and 103. Petitioner does not argue the issue here, but reserves it should the Court issue a writ of certiorari not otherwise limited.

March 1, the club may *unilaterally* renew his contract and cut his salary. Each renewed contract contains the same renewal provision. Section 6(a) authorizes a club to assign a player's contract to any other club, without consultation with the player and without his consent. Thus, the contract in toto binds the player to the club that "owns" him, or its assignee, in perpetuity.

In 1965, this reserve system was extended for the first time to potential new players who have never signed an agreement with any club. A semi-annual draft was devised wherein a drafted potential new player may only bargain with that club which chose him in the involuntary draft.

As the trial court concluded, "From the standpoint of the professional baseball player, its effect [the system's] is to deny him throughout his career freedom to choose his employer." 316 F. Supp. at 273.

The reserve system was tested in the crucible of a three-week trial. As the trial court later said, it was "the first time in almost fifty years [that] opponents and proponents of the baseball reserve system have had to make their case on the merits and support it with proof in a court of law." 316 F. Supp. at 284. Former ball players, former team owners, executives from other sports, the executive director of the Baseball Players Association, and a distinguished economist testified on behalf of petitioner. With one exception, the witnesses for respondents were the respondents themselves or their employees.

Although the issues tried at great length were the "reasonableness" of the reserve system and the carefully documented contention that much less onerous alternatives—lawful ones—would sufficiently protect

the legitimate interests of Organized Baseball,[3] the trial court ultimately declined to reach these issues. It held that Organized Baseball's reserve system was beyond the reach of both federal and state law.

3. The Appeal

On April 7, 1971, the Court of Appeals for the Second Circuit affirmed. In doing so, it confessed its inability properly to dispose of the case on its real merits.

As to petitioner's federal antitrust claims, the court held that the lower courts are bound by the *Federal Baseball Club* ruling that Organized Baseball is not subject to the Sherman Act because its "exhibitions" are local affairs and not "interstate commerce." The court conceded that *Federal Baseball Club* and *Toolson* were "seemingly inconsistent" with the Court's later

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[3] These alternatives, as listed by the trial court, 316 F.Supp. at 275, n. 12, were:

> "Modifications of and alternatives to the present reserve system suggested by plaintiff include: (a) independent competitive leagues; (b) limitation of club control over a player to a fixed term of years; (c) permitting a player to become a free agent after an option period; (d) trade veto for veteran players; (e) minimum salary progression; (f) reduction in the number of reserved players; (g) salary arbitration. Consideration was given them both individually and in combination. Various refinements were advanced to meet certain objections raised as to proposals (b) and (c), including a right of first refusal given to the player's club to match any offer obtained by the player, a restriction of negotiations to only clubs in the other league and then only in the off-season, and/or a more equalized division of baseball revenues among clubs. See Tr. 221-22, 235, 237-38, 247, 255-58, 1966-67, 1981-84, 1985-86, 2020-23."

These were proposed by petitioner to indicate the availability of lawful alternatives to the present stifling system which petitioner contends is a *per se* violation of federal and state antitrust laws.

U.S. 445 (1957), that professional football's similar, but less onerous, reserve system was subject to the anti-trust laws. (App. 3a) And the Court read recent decision in *Radovich* v. *National Football League,* 352 cases to indicate that this Court would no longer infer ratification of prior decisions from congressional silence. Nonetheless, the Second Circuit concluded it was not free to set aside *Federal Baseball Club* and *Toolson*—relief, it said, must come from this Court.

As to petitioner's state antitrust law claims, the Court of Appeals impaled petitioner on the second horn of a dilemma which, Judge Waterman confessed, put petitioner "in a most frustrating predicament." (App. 7a) Although Baseball was held not "interstate commerce" for federal purposes, the Second Circuit held that, for purposes of state law, baseball not only is "'interstate commerce," but is so "uniquely interstate" as to preclude state regulation. The Court conceded that state antitrust regulation is ordinarily not pre-empted by federal antitrust law. *Giboney* v. *Empire Storage Co.,* 336 U.S. 490, 495 (1949). But without examining the law of any particular state, the court advanced the novel idea that the states' interest in antitrust regulation must be subordinated to Baseball's asserted need to be free from compliance with the "strictest state antitrust standard."[4]

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[4] The court reasoned that because of Baseball's structure, it might find it necessary to comply with that state rule which was most stringent. (App. 6a-7a) It did not indicate which standard or state that was, or whether such a standard would differ from that found in the federal antitrust laws. Our own research, set out in a fully documented appendix to our briefs below, indicates that the standards are essentially the same, that there is no problem of diverse regulation.

The court admitted the incongruity of thus giving petitioner the worst of both worlds. But it disclaimed responsibility:

> "Any apparent inconsistency results not from faulty logic, but from the vagaries of fate and this court's subordinate role to the Supreme Court." (App. 8a)

REASONS FOR GRANTING THE WRIT

I. The court below frankly conceded its own inability properly to dispose of this case

After a lengthy trial in which opponents and proponents of the reserve system finally had their day in court, in which proposals sharply to reduce the restrictive nature of the reserve system were aired and considered, and Baseball's claimed "reliance" interest was exposed as a sham, the issue has been left undecided because, according to Judge Waterman:

> "On the one hand, the doctrine of stare decisis binds the plaintiff because of an initial holding that baseball is not 'interstate commerce' within the Sherman Act, and, on the other hand, after there have been significant changes in the definition of 'interstate commerce,' he is now told that baseball regulation cannot apply." (App. 7a)

It is no exaggeration to say, we suggest, that this nation reads the sports pages with rather greater care than its front pages. And it is no service to public respect for justice for the courts to render such plainly incongruous judgments.

II. The time has come to subject Organized Baseball's reserve system to scrutiny under the federal antitrust laws

The simplest way to resolve the dilemma described by Judge Waterman is for this Court to overrule *Fed-*

eral Baseball Club and *Toolson.* Like *The Harrisburg,* 119 U.S. 199 (1886), they "rested on a most dubious foundation when announced, [and have] become an increasingly unjustifiable anomaly as the law over the years has left [them] behind." *Moragne* v. *States Marine Laws,* 398 U.S. at 404.

The case for doing so has been well made by Judge Friendly, writing in *Salerno* v. *American League,* 429 F. 2d 1003, 1005 (2d Cir. 1970), cert. denied sub nom. *Salerno* v. *Kuhn,* 400 U.S. 1001 (1971):

> "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' *Radovich* v. *National Football League,* 352 U.S. 445, 452 (1957) . . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom."

It needs no argument to demonstrate that Organized Baseball is now "interstate commerce." Both courts below so held, and respondents agreed. This Court has already ruled to that effect in connection with other professional sports. *Radovich* v. *National Football League,* 352 U.S. 445 (1957); *United States* v. *International Boxing Club,* 348 U.S. 236 (1955). No reason exists why Baseball should be treated differently.

As for *Toolson,* where the Court declined to reexamine *Federal Baseball Club* and referred the parties

to Congress for a remedy, subsequent events have totally undermined its continued vitality.

1. Since *Toolson* was decided in 1953, the Court has held all other professional sports, and their more benign versions of the reserve system, to be subject to the federal antitrust laws. *Radovich* v. *National Football League, supra; United States* v. *International Boxing Club, supra.* In those decisions, the Court conceded there was no logic in distinguishing other sports from Baseball. With the passage of time, any such distinction has grown increasingly untenable. Were petitioner a linebacker or a forward, rather than a centerfielder, his right to test professional football's or professional backetball's reserve systems would be undisputed. See, *e.g., Haywood* v. *National Basketball Ass'n,* 401 U.S. 1204 (1971).

2. Baseball has itself changed since 1953. The major leagues have grown from sixteen to twenty-four clubs. Franchises have become mobile, moving from city to city. National television revenues have become a major source of income. The reserve system itself has grown more restrictive. When *Toolson* was decided, potential new players were free to select their first employer from among competing clubs. Twelve years later, even this limited area of choice was stamped out. Since 1965, potential new players have been stripped of their once-held freedom to choose their initial employer and now may negotiate only with the club which drafts them in the new semi-annual draft. In short, baseball has become even more commercial, and the reserve system, more restrictive.

3. The so-called "reliance" interest which led the Court in 1953 to decline to grant a retroactive judicial

remedy is no longer a factor.[5] See *Lear* v. *Adkins*, 395 U.S. 653, 674 n. 19 (1969), where the Court overruled prior doctrine, suggesting that any "reliance" interest had been diminished by erosion of the doctrine itself, that the Court was not able to perceive that real harm would flow, and that the "public's interest" had to be weighed in the balance. Since 1953, investors in baseball have witnessed the reserve systems in other sports modified under the aegis of the federal antitrust laws—without *any* of the dire consequences predicted in *Toolson*. Indeed, baseball is widely recognized to have lost ground to these sports. Investors have known that either Congress or the courts might any day strike down or modify Baseball's reserve system. At trial in the present case, Organized Baseball's witnesses conceded that they had never assumed that state antitrust law might not be applied (Tr. 1261-62, 1396, 1531), or that Congress or the courts might not modify or eliminate the reserve clause. Some testified they preferred Congress to the courts because Congress would not impose retroactive liability and because it would give them a full hearing. (Tr. 1244, 1360) But petitioner seeks only prospective relief, and a full hearing they have now had—in the trial court here. Finally, developments in other sports and the record in this case demonstrate that what is involved is not destruction of the reserve system, but only its modification so as to legalize it and increase player freedom without jeopardizing Baseball's legitimate interests.

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[5] We perhaps should note that petitioner here seeks prospective relief only, measuring his damages from the date—December 30, 1969—when the Commissioner of Baseball refused to declare him a "free agent." See *Simpson* v. *Union Oil Co.*, 396 U.S. 13 (1969).

4. Recent decisions of this Court have reinvigorated the rule that it will not regard congressional inaction after controversial judicial decision as legislative ratification of that decision. See *Blonder-Tongue Labs.* v. *University Foundation,* —— U.S. ——, —— n. 17, and —— n. 37, 39 L.W. 4506 (May 3, 1971) (bills to reverse a prior decision had died in committee); *The Boys Market, Inc.* v. *Retail Clerk's Union,* 398 U.S. 235 (1970); and *Moragne* v. *States Marine Lines,* 398 U.S. at 393, 405 n. 17.[6] See also, *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 609 (1966), and *Helvering* v. *Hallock,* 309 U.S. 106, 120 (1940).

5. Reconsideration of *Federal Baseball Club* and *Toolson* would be particularly appropriate. As the record in this case shows, the average professional life of a ball player—few of whom achieve the longevity of petitioner or of a Willie Mays—is only five years. Nearly four generations of ball players, therefore, have been subjected to a group boycott enforced by blacklists while Baseball fended off legislative action through one device or another. Where so much is at stake, and where the affected persons' careers are so short, an eighteen-year waiting period is long enough.

III. The court below ignored controlling decisions of this Court in failing to apply state antitrust law to Organized Baseball's reserve system

In insulating Organized Baseball's reserve system from all state antitrust regulation, the court below did not follow controlling decisions of this Court.

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[6] Congressional deference to the courts in fashioning "the controlling rules of admiralty law," referred to in *Moragne* as justification for reconsidering *The Harrisburg,* is at least equaled by Congress' historical reluctance to amend the basic provisions of the Sherman Act.

Once the Court of Appeals determined to follow *Federal Baseball Club*, it ought to have done so across the board: it should have concluded—as Baseball had itself argued in *Federal Baseball Club*—that state and local laws are applicable if federal law is not. But when the court turned to petitioner's state law claims, it accepted respondents' position that Baseball was indeed "interstate commerce." It then compounded the error by ruling, without the "particularized inquiry" mandated by an unbroken line of decisions of this Court, that Baseball's involvement in "interstate commerce" insulated it from all state antitrust laws.

While granting that the various state antitrust provisions do not appear to impose conflicting duties, the court held, without examining the law of any particular jurisdiction, that the states had insufficient interest in their antitrust laws to warrant imposing whatever this undefined burden was upon Baseball. It simply declared that

> "we do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." (App. 7a)

The court was not able to cite any authority for the proposition that non-discriminatory state antitrust laws should be given an inferior place in the hierarchy of state values, or for the proposition that Baseball's self-interest was to be given more weight than the states' public interest in curbing group boycotts and blacklisting of professional baseball players.

There is no basis in the decisions of this Court under the Commerce Clause for this wholesale displacement of state antitrust laws.

Huron Portland Cement Co. v. *Detroit*, 362 U.S. 440, (1960), announced the two-part standard to be used in determining when non-discriminatory state regulation affecting interstate commerce is permissible. Mr. Justice Stewart wrote that:

> "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . or unduly burdensome on maritime activities or interstate commerce."

The first of these two standards—that Congress has shown a requisite "clear and manifest purpose" to occupy the field—is surely not met here. And the Court below did not hold that it is.[7] (App. 5a)

Nor is the second standard—undue burden on commerce—met here. In determining whether state regu-

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[7] The trial court in this case did base pre-emption partly on legislative inaction after *Toolson*. And two of the seven members of the state court in *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 590 (1966), took a similar position. But recent cases of this Court do not permit an inference of ratification from mere failure to legislate. Affirmative action whose meaning cannot be mistaken has always been required. And it would be particularly inappropriate here where *per se* violations of antitrust law are challenged and where Baseball has argued to one forum after another that state regulation *was* applicable. It should be noted that three members of the Wisconsin court held that state law *should* apply. (Two others joined a four-man majority in favor of Baseball, but on another theory.) In any event, the Wisconsin case is easily distinguished from the present one, for it involved a species of local protectionism—keeping a local enterprise at home—always suspect under the Commerce Clause. See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

lation is unduly burdensome, this Court has always insisted upon what Mr. Justice Black has termed "the importance of a particularized inquiry into the existence of a burden on commerce." *Colorado Comm'n* v. *Continental,* 372 U.S. 714, 720 (1963). And it has never displaced even a single state's law without the most careful and scrupulous examination of the precise regulation involved, its purpose, and its impact upon the activity to be regulated. See, e.g., *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970). Evenhanded state regulation is uniformly sustained except where there has been a showing (1) of actual irreconcilable conflict with applicable laws of another jurisdiction, *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959) (displace Illinois mudguard law which imposes duty inconsistent with those imposed by sister states), and *Colorado Comm'n* v. *Continental, supra,* (sustain an antidiscrimination law where no conflict shown with valid law of another jurisdiction), or (2) of an intolerable—but clearly defined—imposition on an industry or particular enterprise, *Pike* v. *Bruce Church, Inc.,* 397 U.S. at 144-146.

Here, there has been no showing either of conflict between applicable laws, or of unacceptable harm to Baseball. Indeed, the courts below conceded that there appears to be uniformity among the applicable statutes (App. 6a), and that Baseball could accommodate a much less onerous system of controlling its players (App. 38a).

Moreover, the only proper remedy where a state law is found too burdensome is to displace *that particular law.* There is no precedent in the decisions of this Court for immunizing an entire industry from regulation by *any* state on the ground that *one* state might

have a statute which cannot permissibly be applied to the industry. See, e.g., *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), where the court displaced one state's statute—but left the railroads subject to the less stringent laws of all other states.

The court below predicted that Baseball will adjust to the "most stringent" regime laid down by any state in which it operates—just as interstate merchants now adjust to the toughest state standard on what "cooling off" provisions they must offer to door-to-door customers, and what kinds of finance charge disclosures they must make. Absent federal occupation of the field —and the Court of Appeals found none—all the Commerce Clause does for an enterprise not subjected to conflicting duties is to protect it against "a most stringent" law which goes too far. It does not provide protection against those laws which do not offend.

The decision below also seriously misconceived the complementary relationship of state and federal antitrust regulation. Senator Sherman in 1890 expressly justified the bill which became the Sherman Act on the ground that its "single object" was to "*supplement* the enforcement of the established rules of common law and statute law by the courts of the several states." 21 Cong. Rec., 51 Cong., 1st Sess. (1890), 2457. (Emphasis supplied) The House Report on the Sherman Act stated that federal legislation "will prove of little value unless the states shall *supplement* it by such auxiliary and proper legislation as may be within their legislative authority." H.R. 1707, 51st Cong., 1st Sess. (1890), 1. (Emphasis supplied) State antitrust law has, in fact, developed in parallel or supplementary form, rather than in conflict with federal antitrust law. See Lefkowitz, "Antitrust Enforcement for Consumer Protection," 1969 New York State Bar Association

Antitrust Law Symposium, 16-20. For all practical purposes, state antitrust law is nothing more than a grant of supplementary authority to local officials and state courts to enforce substantive provisions which are carbon copies of the first two sections of the Sherman Act, plus prohibitions against deceptive trade practices[8]—precisely the kind of supplementary state regulation permitted by this Court in *Head* v. *Board of Examiners,* 374 U.S. 424, 431 (1963). See especially Mr. Justice Brennan's concurring opinion, 374 U.S. at 441-446, on the relationship of the FCC and the FTC to state regulation.

Finally, the decision below unnecessarily diminishes state antitrust law—indeed paralyzes it. The rationale of the court jeopardizes, for example, developing state efforts to protect consumers against companies engaged in interstate commerce but not now adequately regulated by federal law. If Baseball's self-interest in avoiding state regulation is superior to the states' public interest in dealing with group boycotts and blacklists directed against their citizens, why is a door-to-door seller's similar self-interest not superior to a state's interest in giving its citizens three days to cancel each sale? Or in requiring disclosure of the ultimate finance charges? And what other legitimate public interests are threatened with subordination to private interest on the theory espoused below? As one distinguished state court has observed,

> "If state laws have no force as soon as interstate commerce begins to be affected, a very large area

[8] Note, 61 Colum. L. Rev. 1469 (1961). See John Bodner's annual surveys of state antitrust law in 39 Antitrust L.J. 755 (1970); 38 Antitrust L.J. 555 (1969); 37 Antitrust L.J. 609 (1968). And see the illustrative state statutes set out in Appendix D.

> will be fenced off in which the states will be practically helpless to protect their citizens without . . . a corresponding contribution to the national welfare." *Commonwealth* v. *McHugh*, 326 Mass. 249, 265, 93 N.E. 2d 751, 762 (1950).

Never before has this Court authorized the wholesale displacement of state statutes which have not been shown to be discriminatory or to conflict with one another or with federal law, or to threaten a genuine and carefully defined harm to an interstate activity, which harm outweighs the local public interest. Never before has it pre-empted the laws of every state on the ground that one such law—were it to be examined—might prove offensive.

This decision requires plenary review.

IV. Organized Baseball should not be allowed to maintain, under the imprimatur of this Court, in one forum after another that "some other forum" is the appropriate one to deal with the abuses of its reserve system

For half a century, Organized Baseball has succeeded in persuading one forum after another that "some other forum" is the appropriate one to deal with the abuses of the reserve clause. In its brief to this Court in 1922, Organized Baseball argued that baseball should be exempted from federal antitrust regulation because

> "a state is entirely competent to reach and deal with any evil in the field of sport requiring legislative remedy."

Resp. Br., No. 204, 1921 Term, p. 67. It then told Congress that the federal courts were available. In the words of the Celler Subcommittee's 1952 report, Baseball

> "represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause

> will be tested [in the courts] by the [Sherman Act's] rule of reason." H.R. Rep. 2002, 82d Cong., 2d Sess. (1952), 231.

Then, in 1953, Baseball successfully—if opportunistically—argued to this Court in *Toolson* that it ought not to subject the reserve system to the Sherman Act's "rule of reason" because Baseball was sufficiently regulated by state law. Respondent New York Yankees told this Court that a baseball game in Los Angeles is only

> "a local affair subject to the regulatory powers of the State of California and the City of Los Angeles."

Br. p. 30. But in 1966, Baseball argued to the Wisconsin state court that only *federal* law could regulate baseball adequately. *Wisconsin* v. *Milwaukee Braves, Inc.,* 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 590 (1966). Then, in 1969, Baseball insisted in the National Labor Relations Board that any labor dispute in the sport would *not* substantially affect interstate commerce and, in any event, baseball was now international in its operations. *American League & Ass'n of Umpires,* 180 N.L.R.B. No. 30, Case 1-RC-10414 (Dec. 15, 1969).

Baseball cannot have it all ways—to stave off state regulation on the ground that only federal regulation is adequate, federal regulation on the ground that state regulation will suffice, the courts on the ground that legislation is necessary, and legislation on the ground that the courts will do.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the decision below.[9]

Respectfully submitted,

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[9] Petitioner has not addressed the contention advanced by respondents at trial but not reached by the courts below, that the reserve system is a matter for collective bargaining and hence exempt from state and federal antitrust laws under *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959), and *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). Neither of these decisions holds that an *employer* conspiracy to restrain trade is exempted from antitrust regulation where an employee group has become implicated in the scheme. No Justice participating in *Meat Cutters* dissented from the proposition that hard core "anticompetitive commercial restraint[s]" like "price-fixing and market allocation" —and petitioner would add group boycotts—were subject to antitrust regulation even where bargained about. 381 U.S. at 732-33 (concurring opinion). As this Court unanimously warned in 1949, "Benefits to organized labor cannot be utilized as a cat's paw to pull employer's chestnuts out of antitrust fires." *United States* v. *Women's Sportswear Mfr's Ass'n*, 336 U.S. 460, 464 (1949). See also *Allen Bradley Co.* v. *Local No. 3*, 325 U.S. 747 (1945). Similar arguments by football were rejected by this Court in *Radovich* as "without merit," and the reserve systems of other sports are now regulated by state and federal antitrust laws.

The argument comes with particular ill grace from Baseball which has always refused to "bargain" meaningfully about the Reserve Clause—even assuming that employees must "bargain" to remove unlawful restrictions on their freedom, or to secure the minimum wage required by law, or to end racial or other discrimination in hiring and promotion policy. Until this case was brought, Baseball would not discuss the reserve system with the players. Characteristically, during trial it contended—in court, not at the bargaining table—that the issue was one for collective bargaining. If anything is certain, it is that denial of certiorari here will terminate Baseball's sudden interest in bargaining over the reserve system. In any event, Baseball made clear in court that by "bargaining" it does not mean making concessions or changes. (App. 41a-42a)

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 608—September Term, 1970.

(Argued January 27, 1971 Decided April 7, 1971.)

Docket No. 35424

CURTIS C. FLOOD, *Plaintiff-Appellant,*

v.

BOWIE K. KUHN, *et al., Defendants-Appellees.*

Before:

WATERMAN, MOORE and FEINBERG, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Cooper, *J.*, dismissing plaintiff's complaint which challenged, as violative of federal and state antitrust law and the Thirteenth Amendment of the Constitution, organized professional baseball's "reserve clause."

Affirmed.

ARTHUR J. GOLDBERG, JAY H. TOPKIS, MAX GITTER, WILLIAM D. IVERSON, Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, New York City, *for Plaintiff-Appellant.*

PAUL A. PORTER, VICTOR H. KRAMER, DOUGLAS G. ROBINSON, Arnold & Porter, Washington, D. C.; George S. Leisure, Jr., John E. Tobin, Donovan, Leisure, Newton & Irvine, New York City, *for Defendant-Appellee Kuhn.*

LOUIS L. HOYNES, JR., LOUIS F. CARROLL, MARK F. HUGHES, BARRY RONA, ROBERT J. KHEEL, Willkie, Farr & Gallagher, New York City; ALEXANDER H. HADDEN, JAMES P. GARNER, G. WARREN DAANE, SARGENT KARCH, Baker, Hostetler & Patterson, Cleveland, Ohio, *for all Defendants-Appellees except Kuhn.*

WATERMAN, *Circuit Judge:*

Plaintiff and his able counsel have undertaken a comprehensive attack on professional baseball's "reserve system," which, pursuant to nationwide agreements among clubs, effectively restricts a baseball player, if he desires to play professional baseball at all, to contract negotiations with that club in organized baseball which first employs or "reserves" him or with that club's assignee club, and any subsequent assignee clubs, to which in the parlance of the baseball business he has been "sold" or "traded." After an extensive trial below the complaint was dismissed and, with the benefit of an all-inclusive record, this appeal followed. Four counts of plaintiff's complaint are here involved:[1] the first alleges that the reserve system and its boycott sanctions violate the Sherman Act, the second alleges violations of the antitrust laws of the states and the foreign country, Canada, where defendants conduct their business, the third alleges violations of the common law, and the fourth challenges the reserve system under the Thirteenth Amendment. Federal jurisdiction on the second and third counts is premised on diversity of citizenship. For the reasons stated below, we are compelled to affirm the district court's decision.

I.

In *Federal Baseball Club* v. *National League*, 259 U.S. 200 (1922), a unanimous Supreme Court speaking through Mr. Justice Holmes held that the business of organized baseball was not subject to the Sherman Act because it did not

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[1] In his complaint plaintiff named as defendants each of the twelve clubs in each of the two major leagues, and, also, in the antitrust cause of action, the presidents of each league, Charles S. Feeney and Joseph E. Cronin, and the Commissioner of Baseball, Bowie K. Kuhn, individually and in their respective official capacities.

constitute interstate commerce, although it was explicitly pointed out in the opinion that the clubs composing the Leagues are in different cities and, for the most part, in different states, and that when the clubs meet to play against one another in public exhibitions for money the clubs cross state lines in order to make the meetings possible. In 1953 the Court, with two Justices dissenting, declined, without any reexamination of the underlying issues, to review its 1922 approach despite the considerable change the Court itself had fostered during the intervening thirty years in the definition of "interstate commerce." The Court indicated that, inasmuch as those interested in the business of organized baseball had relied for 30 years upon the ruling in *Federal Baseball*, remedial action was better left to Congress. *Toolson* v. *New York Yankees*, 346 U.S. 356 (1953). In 1957, in contrast, the Court held that the Sherman Act was applicable to professional football. *Radovich* v. *National Football League*, 352 U.S. 445 (1957).

Although faced with the seemingly inconsistent decisions in *Toolson* and *Radovich*, our court only last summer refused, in *Salerno* v. *American League*, 429 F.2d 1003 (2 Cir. 1970), *cert. denied*, —— U.S. —— 1971, 39 U.S.L. Week 3298 [2] to depart from the Supreme Court's holding in *Toolson*. As we stated in *Salerno:*

> We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious

[2] It is well settled that denial of certiorari by the Supreme Court does not indicate any decision with reference to the merits of a case. *United States* v. *Shubert*, 348 U.S. 222 (1955); *Agoston* v. *Pennsylvania*, 340 U.S. 844 (1950). This would seem to be particularly true in *Salerno* where the plaintiffs, being umpires, were not subject to the provisions of a player's reserve clause and had "exceedingly difficult obstacles" to overcome in addition to *Federal Baseball and Toolson*. 429 F.2d at 1005.

> and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is "unrealistic," "inconsistent" and "illogical." Radovich v. National Football League, 352 U.S. 445, 452, 77 S.Ct. 390, 1 L.Ed. 2d 456 (1957) . . . . However, . . . we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch. 429 F.2d at 1005.

We adhere to the sentiments we expressed in *Salerno* and are compelled to affirm the dismissal of plaintiff's first count.[3]

II.

We treat together plaintiff's second and third counts, alleging violations of state antitrust laws and viola-

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[3] It should be noted that in 1949 two distinguished members of this court, Judge Learned Hand and Judge Jerome Frank, confidently predicted the overruling of *Federal Baseball* insofar as that holding dealt with the reserve system. *Gardella* v. *Chandler*, 172 F.2d 402 (2 Cir. 1949). In particular, Judge Frank stated:

> "This court cannot, of course, tell the Supreme Court that it was once wrong. But 'one should not wait for formal retraction in the face of changes plainly foreshadowed;' this court's duty is 'to divine, as best it can, what would be the event of the appeal in the case before it.' L. Hand, C.J., dissenting in Spector Motor Service Co. v. Walsh, 2 Cir., 139 F.2d 809, 823." 172 F.2d at 409 n. 4.

Inasmuch as shortly thereafter, in 1953, *Toolson* proved these distinguished jurists' prediction to be premature, we do not venture to prophesy the Supreme Court's decision in the present case.

tions of the common law.[4] At the threshold we find nothing in *Federal Baseball* or in *Toolson* which would indicate, as defendants urge, that the Supreme Court exempted baseball from all antitrust regulation. Nor, on the other hand, do these cases hold, as plaintiff urges, that state antitrust laws apply to baseball. These cases speak only to the applicability of federal antitrust policies: whether state antitrust laws might apply was not directly decided. Thus, we are faced with a question of first impression, and we must consider whether application of state antitrust law to professional baseball is barred by a federal pre-emption of the field under the Commerce Clause.

It appears to be without question that, today, professional baseball, with its complex web of franchises, farm teams and recruiters, and its multi-million dollar contracts with television and radio networks, is interstate commerce. Our difficulty lies in determining to what extent, if at all, the states are precluded from antitrust regulation of interstate commerce. *See* Note, *The Commerce Clause and State Antitrust Regulation*, 61 Colum. L. Rev. 1469 (1961). The Supreme Court has not, to our knowledge, expressed any opinion as to the outer limits of state antitrust policy, although it has clearly held that state antitrust policy is not ousted from the regulation of local matters which may also be affected by federal laws. See *Watson* v. *Buck*, 313 U.S. 387, 403-404 (1941); *Giboney* v. *Empire Storage Co.*,

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[4] Plaintiff acknowledges that, since *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), the common law to be applied in federal court is the common law of the individual states. However, he urges that a federal common antitrust law may be appropriate where uniformity among the states is needed. Inasmuch as federal antitrust policy is embodied in Acts of Congress, this approach would seem to be merely an attempt to avoid *Toolson* by entering through the back door.

With reference to applying state common law to the problem here, it is obvious that the arguments based upon varying state statutory antitrust standards are equally applicable to the common law of the several states.

336 U.S. 490, 495 (1949). Therefore, we turn for guidance to cases involving other areas of state regulation.

Plaintiff argues that recent Supreme Court decisions have evidenced a trend toward the requiring of an actual conflict, as opposed to a potential conflict, resulting from differing state regulation if state action is to be precluded under the Commerce Clause.[5] He asserts that, with reference to control over baseball's reserve system, there is no actual conflict among the requirements of state antitrust laws. While we recognize this trend, we do not consider this distinction between actual and potential conflicts to be the sole criterion for finding an impermissible burden on interstate commerce. For example, in taxation cases, there is no conflict between two states taxing the same property, but there may well be a burden on interstate commerce, *Norfolk & W.R. Co.* v. *Missouri State Tax Com'n*, 390 U.S. 317, 323-325 (1968). Also, where the nature of an enterprise is such that differing state regulation, although not conflicting, requires the enterprise to comply with the strictest standard of several states in order to continue an interstate business extending over many states, the extraterritorial effect which the application of a particular state law would exact constitutes, absent a strong state interest, an impermissible burden on interstate commerce. *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 774-775 (1945).

Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional baseball is not to be severally fragmented. On the one hand, it is apparent that each league extends over many states, and that, if state regulation were permissible, the internal structure of the leagues would require com-

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[5] Compare *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520, 527 (1959), with *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 448 (1960).

pliance with the strictest state antitrust standard. The consequent extra-territorial effect of necessary compliance would be considerably more farreaching than that in *Southern Pacific Co.* v. *Arizona, supra.* On the other hand, we do not find that a state's interest in antitrust regulation,[6] when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law.

We readily acknowledge that plaintiff is caught in a most frustrating predicament, a predicament which defendants have zealously seized upon with great perspicacity. On the one hand, the doctrine of stare decisis[7] binds the plaintiff because of an initial holding that baseball is not "interstate commerce" within the Sherman Act, and, on the other hand, after there have been significant changes in the definition of "interstate commerce," he is now told that baseball is so uniquely interstate commerce that state regulation cannot apply.[8] However, in our own defense, we

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[6] See Note, *supra*, 61 Colum. L. Rev. 1469, 1471-1473 (1961).

[7] We leave to the commentators the relevance of Mr. Justice Holmes' much-quoted comment on precedent to his opinion in *Federal Baseball* and the decision in *Toolson:*

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver Wendell Holmes, Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).

[8] Unlike the ballplayers, baseball management has been quite adept at forecasting legal decisions. In *Federal Baseball* counsel for the defendants opened his argument: "Organized Baseball is not interstate commerce . . ." 259 U.S. 200, 206 (1922). Having obtained an exemption from the Sherman Act under the legal standards of 1922, professional baseball can now properly urge that baseball in 1971 is indeed both interstate and international commerce.

do not consider our decision to be internally inconsistent. In disposing of the Sherman Act count in plaintiff's complaint, we are bound by Supreme Court decision, while in our disposition of the state and common law counts, we must of necessity decide this question of first impression by present Commerce Clause standards and not the standards applicable in 1922. Any apparent inconsistency results not from faulty logic, but from the vagaries of fate and this court's subordinate role to the Supreme Court.

The defendants also claim that under federal labor law the reserve clause is a subject of mandatory bargaining between the ballplayers and the club owners and, therefore, that federal labor policy exempts the reserve system from state regulation. Because of our disposition of plaintiff's second and third counts on Commerce Clause grounds, we find it unnecessary to reach this additional contention.

III.

Inasmuch as plaintiff retains the option not to play baseball at all, his Thirteenth Amendment argument is foreclosed by this court's decision in *United States* v. *Shackney*, 333 F.2d 475 (2 Cir. 1964), a decision which we adhere to as sound.

The judgment of dismissal is affirmed.

MOORE, *Circuit Judge* (concurring):

Baseball for almost a century has been our country's "national" sport. Every decade since the days of Abner Doubleday and A.G. Spalding has developed outstanding players, heroes in the hearts and minds of millions of Americans—heroes whose names are enshrined in a baseball "Hall of Fame." In this century alone the names of such players (to select a few) as Christy Mathewson, Walter Johnson, the remarkable Ty Cobb, Babe Ruth of home-run fame, Lou Gehrig and more recently Ted Wil-

liams and Willie Mays were probably better known to a greater number of our populace than many of our statesmen; and their exploits better remembered than the activities of our outstanding public figures. Such slogans as "Tinker-to-Evers-to-Chance" became by-words. Even big businesses—at least their employees—were apt to subordinate their important affairs to baseball at the time of the October World Series. And such names as the Dodgers, the Yankees, Cubs, Giants and Braves were household words. In short, organized baseball existed almost as an enclave or feudal barony throughout the years, managing its own affairs as best calculated to preserve the sport and maintaining its own officialdom for self-regulation purposes—and, except for the brief scandal of the so-called Chicago Black Sox of 1919, apparently has handled its little kingdom and its subjects very well.[1]

Until 1913 there were two leagues, the National and the American, which were known as the major leagues, each league consisting of eight teams in major cities of the country. In that year a new league came into being, the "Federal League of Professional Baseball Clubs." This league issued franchises to clubs also in various cities, some of which had teams in the National and American Leagues. The "Federal League" continued in existence until December 1915 when by agreement with the National and American Leagues it and its constituent clubs dissolved except for the "Federal Baseball Club of Baltimore, Inc." (Baltimore). Asserting that the dissolution was caused by acts in violation of the federal antitrust laws, Baltimore brought suit for treble damages against the major leagues and certain of their officers. A judgment of $240,000 was obtained by Baltimore. Upon appeal to the Court of Appeals, the judgment was reversed with instructions to enter judgment for the defendants in the suit.

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[1] For a detailed description of modern baseball organization, see the findings of fact in *State* v. *Milwaukee Braves, Inc.*, 31 Wis.2d 299; 144 N.W.2d 1, 3-5 (1966).

Since the suit was based on the antitrust laws which in turn involved interstate commerce, the Court of Appeals after reviewing the *modus operandi* of the two major leagues and their regulatory body, the National Commission, discussed the case in relation to these laws and directed itself to answering the question whether baseball exhibitions constituted "trade or commerce within the meaning of the Sherman Act?" and involved interstate commerce.

The court concluded that a "game of baseball" was purely "local in its beginning and in its end" and that although the players traveled from place to place in interstate commerce, "they are not the game." The Court said, "Not until they [the players] come into contact with their opponents on the baseball field and the contest opens does the game come into existence."—hence—"the game effects no exchange of things according to the meaning of 'trade or commerce.'" *National League of Prof. Baseball Clubs* v. *Federal Baseball Club of Baltimore, Inc.*, 269 Fed. 681, 684-685 (D.C. Cir. 1920).

The court also considered the restrictive clauses (as here) in the players' contracts as allegedly violative of the antitrust laws and commented that "If the reserve did not exist, the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the league would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them." Moreover, the reserve clause had the effect "of preventing players from disregarding their obligations." 269 Fed. at 687. The case was then argued before the Supreme Court.

This somewhat lengthy preamble is deemed necessary both to understand and put in proper perspective the Supreme Court decision,[2] featured in appellant's and ap-

[2] *Federal Baseball Club of Baltimore, Inc.* v. *National League of Prof. Baseball Clubs*, 259 U.S. 200 (1922).

pellees' arguments. The syllabus of the arguments reveals that the points urged in 1971 were not dissimilar to those urged in 1922. In a brief opinion, Mr. Justice Holmes wrote for the court (there being no dissent): "The decision of the Court of Appeals went to the root of the case and if correct makes it unnecessary to consider other serious difficulties in the way of the plaintiff's recovery." 259 U.S. at 208. The Court adopted the lower court's concept of baseball exhibitions as "purely state affairs" and that interstate transportation of players and equipment was only incidental thereto. 259 U.S. at 208, 209. In short, the Court held that the personal efforts of the players was "not a subject of commerce," and that "restrictions by contract that prevented the plaintiff from getting players to break their bargains * * * were not an interference with commerce among the States." 259 U.S. at 209.

After this decision some 31 years elapsed during which the New York Yankees and Giants vied for supremacy in many of these years in Worlds Series before huge crowds concentrating in New York from the then 48 States. Other clubs broke the Yankee-Giant monopoly without the aid of antitrust laws and achieved championship rank, including the Senators, the Reds, the Tigers, the Athletics and the Cards (the cities can be identified without footnotes).

In the interval between 1922 and 1953, this court considered a suit based upon the alleged illegality of the reserve clause in *Gardella* v. *Chandler*, 172 F.2d 402 (1949). Although by a two-to-one decision the court remanded the case for trial, Judge Frank's prediction that the Supreme Court had "completely destroyed the vitality of *Federal Baseball*" and had "left that case but an impotent zombie." 172 F.2d at 408, 409, turned out to be highly inaccurate in the light of the Supreme Court's subsequent 1953 and 1957 decisions.

In 1953, on facts not dissimilar from those of this case, the Supreme Court again had an opportunity to examine

(or better to re-examine) organized baseball through antitrust glasses. *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953) had originated in a suit by Toolson, a professional baseball player who claimed that while under contract with Newark his contract was assigned to Binghamton. He refused to report to Binghamton and was placed on an ineligible list, thus preventing him from playing. On motion the action was dismissed "for want of jurisdiction." The district court relied on the Supreme Court's decision in *Federal Baseball* and referred to the many cases in which that decision had been cited with approval.[3] The Ninth Circuit Court of Appeals affirmed on the lower court's opinion. 200 F.2d 198 (1952).

The Supreme Court in its decision left no doubt "that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws," and that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U.S. at 357. The majority commented that for thirty years Congress had allowed baseball "to develop, on the understanding that it was not subject to existing antitrust legislation" and that any change should be made by congressional action. *Id.* The Court did not restrict itself to federal or state laws but said "existing antitrust legislation." *Id.*

During the intervening years from 1922 to date, other sports developed their professional intercity teams, formed leagues and achieved a public popularity scarcely envisioned in the earliers days. As communications facilities and techniques developed that which was clicked out by telegraph key or transmitted by telephone was superseded by radio and television. However, the interstate transmission of news was not changed; only the methods. Although arguments are made by court and counsel based

[3] 101 F.Supp. 93, 94 (S.D. Cal. 1951).

upon alleged factual changes with respect to interstate communications, the business of baseball has not changed its interstate character over the years. Of necessity it has always been interstate. Now there are more viewers across the nation but this fact is not relevant to the interstate nature of the sport except to make it more so.

In 1954 two types of entertainment by means of public exhibition sought to take advantage of *Federal Baseball* and *Toolson, i.e.,* theatrical performances and boxing. Interstate commerce was definitely involved in both cases and in each case the government's antitrust complaint had been dismissed on motion in reliance by the district court on *Federal Baseball* and *Toolson*. *United States* v. *Shubert,* 348 U.S. 222 (1955) and *United States* v. *International Boxing Club of New York, Inc.,* 348 U.S. 236 (1955), decided the same day. In *Shubert* the Supreme Court interpreted *Federal Baseball* as "dealing with the business of baseball and nothing else," and that *Federal Baseball* "did not automatically immunize the threatical business from the antitrust laws." 348 U.S. at 228, 229. As to *Toolson* the Court said, "For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause,'" a ruling which Congress had actively considered but which it had "not seen fit to reject [it] by amendatory legislation." 348 U.S. at 229. In *International Boxing Club* the Court refused to extend the baseball exemption to boxing but continued to recognize the unique position of organized baseball as buttressed by *Federal Baseball* and *Toolson*. See 348 U.S. at 242.

Two years later the Supreme Court had to face the claim of a professional football player that the National Football League, its member clubs and the commissioners of two leagues had conspired to violate the antitrust laws because of a restrictive player contract. *Radovich* v. *National Football League,* 352 U.S. 445 (1957). Again the

Supreme Court clearly indicated that organized baseball still occupied its exempt status, saying, "[W]e now specifically limit the rule there established to the facts there involved, *i.e.*, the business of organized professional baseball." 352 U.S. at 451. The Court stated its reasons for its limitation:

> "The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years."

352 U.S. at 450.

The Court's own policy for the future was set forth: "As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those [*Federal Baseball* and *Toolson*] cases." 352 U.S. at 451. That interpretation was: "But *Federal Baseball* held the business of baseball outside the scope of the Act." 352 U.S. at 452. The Court recognized that "the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance." but concluded that "[t]his is not a new approach. See *Davis* v. *Department of Labor*, 317 U.S. 249, 255 (1942); *compare Rutkin* v. *United States*, 343 U.S. 130 (1952)." *Id.*

The last word from this court is to be found in *Salerno* v. *American League of Prof. Baseball Clubs*, 429 F.2d

1003 (1970), *cert. denied,* 400 U.S. 1001 (January 12, 1971). The suit was brought in the district court by two discharged umpires who claimed that their discharge was caused by their endeavor to organize American League umpires for collective bargaining. Charges of unfair labor practices were also filed with the National Labor Relations Board. The motion to dismiss the cause of action based on the antitrust laws was granted. On appeal this court said that there was "serious doubt whether the complaint here stated a claim under them [antitrust laws]," but then went on to discuss the likely overruling of *Federal Baseball* and *Toolson.* The court recognized that *Toolson* was based upon the ground that "Congress had no intention to bring baseball within the antitrust laws, not that baseball's activities did not sufficiently affect interstate commerce." The dismissal was affirmed, the court reserving for the Supreme Court "the exclusive privilege of overruling its own decisions." 429 F.2d at 1005.

In my opinion there is no likelihood that such an event will occur. As I analyze the history of organized professional baseball over the last 50 years, it has shown without Court interference remarkable stability under self-discipline. The Supreme Court in 1922 undoubtedly felt that it should adopt a "hands off" policy as to this one particular sport which had attained by then such a national standing that only Congress should have the power to tamper with it. And properly so. Baseball's welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record.

Just as the Supreme Court in 1955 recognized that baseball "had grown and developed" and "in reliance on the *Federal Baseball* precedent," *United States* v. *Shubert, supra,* 348 U.S. at 229, so much the more has it grown be-

tween 1955 and 1971. The eight teams in each league have been expanded to twelve. Thus twenty-four teams are playing intersectional games in many cities which did not have major league exhibitions available in former years. The reasons for adopting a "hands off" policy by the courts of this particular sport have multiplied. Congressional and Labor Board attention is being given in such areas of baseball as may be appropriate for regulation.

Appellant argues that even if this court follows *Federal Baseball* and *Toolson*, "THEN IT MUST SUBJECT BASEBALL TO STATE LAWS." True, in *Federal Baseball* the distinguished justice did refer to baseball exhibitions as "purely state affairs." But from this reference does not follow the conclusion that, therefore, state antitrust laws apply. To the contrary, the decision was based upon the assumption that baseball is "not a subject of commerce." 259 U.S. at 209. However, if there were to be any doubt, the Supreme Court itself resolved those doubts in *Toolson*.

The organization of professional baseball as it now exists cannot be better stated than in the findings of fact of the trial court and in the opinion of Mr. Justice Fairchild in *State* v. *Milwaukee Braves, Inc.*, 31 Wis.2d 699, 144 N.W.2d 1 (1966). Equally well set forth are the reasons why organized professional baseball could not possibly be subjected to the antitrust laws of the several States in which the games are played.

Therefore, without any reservations or doubts as to the soundness of *Federal Baseball* and *Toolson*, I would affirm the decision below on all four counts and would limit the participation of the courts in the conduct of baseball's affairs to the throwing out by the Chief Justice (in the absence of the President) of the first ball of the baseball season.

APPENDIX B

UNITED STATES DISTRICT COURT, S. D. NEW YORK.

No. 70 Civ. 202.

CURTIS C. FLOOD, *Plaintiff*,

v.

BOWIE K. KUHN, INDIVIDUALLY AND AS COMMISSIONER OF BASEBALL, ET AL., *Defendants*.

Aug. 12, 1970.

Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, New York City, Allan H. Zerman, Clayton, Mo., for plaintiff; Arthur J. Goldberg, Jay H. Topkis, Richard M. Moss, Daniel Levitt, Max Gitter, William D. Iverson, New York City, of counsel.

Donovan, Leisure, Newton & Irvine, New York City, for defendant Bowie K. Kuhn. George S. Leisure, Jr., John E. Tobin, New York City, of counsel.

Arnold & Porter, Washington, D. C., for defendant Bowie K. Kuhn; Paul A. Porter, Victor H. Kramer, Washington, D. C., Douglas G. Robinson, Washington, D. C., of counsel.

Willkie, Farr & Gallagher, New York City, for all defendants except Bowie K. Kuhn; Louis F. Carroll, Mark F. Hughes, Louis L. Hoynes, Jr., Barry Rona, Robert J. Kheel, New York City, of counsel.

Baker, Hostetler & Patterson, Cleveland, Ohio, for defendant Joseph E. Cronin, President of American League of Professional Baseball Clubs, and all American League Clubs; Alexander H. Hadden, James P. Garner, G. Warren Daane, Sargent Karch, Cleveland, Ohio, of counsel.

COOPER, District Judge.

On October 8, 1969, Curtis C. Flood, then a major league professional baseball player for the St. Louis Cardinals, was "traded," his contract transferred and assigned to another National League baseball club, the Philadelphia Phillies, as part of a multi-player transaction between the two clubs. At the time of the trade he was thirty-two years old, a veteran of twelve years service with the Cardinals, co-captain of the team, and acknowledged to be a player of exceptional and proven baseball ability. Unhappy and disappointed, Flood was unwilling to play for Philadelphia, but forbidden by his contract and the rules of organized professional baseball from negotiating with any other ball club.

He initiated this action on January 16, 1970 against the twenty-four major league clubs comprising the American and National Leagues of organized baseball, their respective Presidents, and against the Commissioner of Baseball asserting in four separate causes of action that baseball's "reserve system" is unlawful.[1] Briefly stated, the reserve system, commonly referred to as the "reserve clause," consists of a number of baseball rules, regulations and uniform contract terms which together operate to bind a player to a ball club and restrict him to negotiating with that club only.

The first of plaintiff's four causes of action alleges that the reserve system constitutes a conspiracy among the defendants to boycott the plaintiff and to prevent him from playing baseball other than for the Philadelphia club in violation of the Sherman and Clayton Anti-Trust Acts. His second and third causes of action are state law claims

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[1] A fifth and largely unrelated cause of action against the St. Louis Cardinals and New York Yankees attacked as anticompetitive and in violation of federal anti-trust laws certain alleged relationships between those clubs and other non-baseball enterprises.

against eleven of the twenty-four club defendants,[2] with jurisdiction based on diversity of citizenship. The second contends that the reserve system and defendants' practices thereunder constitute violations of the antitrust laws of New York, California and the other states where major league baseball is played and also violate state civil rights statutes, while the third contends that by the reserve system defendants have restrained the plaintiff's "free exercise of playing professional baseball in New York, California, and the several states in which defendants stage baseball games, in violation of the common law." His fourth cause of action, directed against thirteen club defendants and alleging federal question and civil rights jurisdiction under 28 U.S.C. §§ 1331 and 1343, asserts that the reserve system is a form of peonage and involuntary servitude in violation of the anti-peonage statutes, 42 U.S.C. § 1994 and 18 U.S.C. § 1581, and the Thirteenth Amendment and that it deprives him of "freedom of labor" in violation of the Norris-LaGuardia Act, 29 U.S.C. §§ 102, 103.

By way of relief plaintiff seeks a declaration of the illegality of baseball's reserve system, an injunction restraining defendants from agreeing among themselves to refuse him employment, and certain damages allegedly sustained since December 30, 1969 as a result of defendants' refusal to bargain with him as a free agent.

Following the filing of his complaint, plaintiff moved before this Court on February 3, 1970 for a preliminary injunction declaring him a free agent, or, as we viewed it alternatively, permitting him to remain as a player for St. Louis pending a final determination of the merits. On March 4, 1970 we denied this application for an injunction *pendente lite* on the grounds that it would disturb the status quo; that the balance of hardship did not tip decidedly in plaintiff's favor; and that there was in-

[2] No individual is named as a defendant.

sufficient showing of probable eventual success on the merits of any of his four causes of action. Flood v. Kuhn, 309 F. Supp. 793 (S.D.N.Y. 1970).

On March 24, 1970 we granted plaintiff's application for an early trial. On April 23, 1970 we deferred action, pursuant to Rule 12(d), F.R.Civ.P., on defendants' motions to dismiss the first four causes of action, but granted summary judgment dismissing the unrelated fifth cause of action above-mentioned against the St. Louis Cardinals and New York Yankees. Flood v. Kuhn, 312 F. Supp. 404 (S.D.N.Y. 1970).

The remaining four causes of action contesting the legality of baseball's reserve system were tried to this Court from May 19 to June 10, 1970. The trial record consists of some 2000 pages of transcript and 56 exhibits. At the close of trial we reserved decision and fixed July 13, 1970 as the date for all post-trial memoranda.

We resolved to allow great liberality in the making of the total trial record to the end that each theory or contention advanced by the litigants would be amply covered and dealt with when all the proof was in.

Baseball and the Reserve System

Baseball is our national pastime and has been so for well over a century. Most of our interest in the sport as fans and spectators centers around professional or organized baseball. Organized baseball consists of the twenty-four major league teams which comprise the American and National Leagues and the various tiers of minor leagues which serve principally as training grounds for aspiring players. Tr. 645-46.[3] There exist no competitive professional teams in North America outside this structure. *Id.* All are governed by either the Major League Rules or the

[3] "Tr." followed by a number refers to pages of the trial transcript herein.

corresponding Professional Baseball Rules (applicable to the minor leagues) and are subject to the broad powers of the Commissioner of Baseball. Tr. 647-52; Major League Agreement, Articles I, IV, VII, IX.

At the center of this single, unified but stratified organization of baseball leagues is the reserve system, the essence of which has been in force for nearly one hundred years, almost the entire history of organized professional baseball. All teams in organized baseball agree to be bound by and enforce its strictures. It is perhaps the cornerstone of the present structure in that it insures team continuity and control of a supply of ballplayers. It is the heart of plaintiff's complaint.

From the standpoint of the professional baseball player, its effect is to deny him throughout his career freedom to choose his employer. Since 1965 each new player seeking to enter baseball has been exposed to a draft by the major and minor league clubs. See Major League Rule 4. If selected by a club in this semi-annual draft, he may bargain only with that club; should he wish not to play for that club he must wait until the next draft is held. *Id.*

Regardless of whether his entry into organized baseball is through the player draft or as a free agent, he must sign a Uniform Player's Contract, the only form of contract permitted between player and club, which empowers the signing club unilaterally to renew his contract continuously from year to year should he and the club fail to come to terms on a new agreement.[4] Once signed he is

[4] Rule 3(a) of the Major League Rules and Professional Baseball Rules agreed to by all professional baseball clubs requires that each club contract with its players only pursuant to the Uniform Player Contract prescribed by the Major League Executive Council and specifically that "no club shall make a contract * * * containing a non-reserve clause." Further, "[t]he making of any agreement between a club and a player not embodied in the con-

thereafter forbidden to negotiate toward prospective baseball employment with any club other than the one to whom he is under contract.[5] Thus, the club has a right to his services for as long as it wishes to renew his contract, subject only to his right to retire from baseball. The total number of ballplayers so controlled is limited by the provision that no major league club may have over forty active players under contract and on its reserve list.[6]

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tract shall subject both parties to discipline; and no such agreement, whether written or verbal, shall be recognized or enforced."

The renewal clause is contained in paragraph 10(a) of the Uniform Player Contract and provides that if in the year of expiration of the contract a player and club do not reach agreement on a new contract by a certain date "the Club shall have the right by written notice to the Player at [his] address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice * * * at a rate not less than 80% of the rate stipulated for the preceding year." Any contract so renewed would itself contain this renewal clause.

[5] Rule 3(g) of the Major League and Professional Baseball Rules provides:

"(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, * * * unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement."

[6] The reserve rule, Major League Rule 4-A, provides in part:

"On or before November 15 in each year, each Major League Club shall transmit to the Commissioner and to its League President a list of not exceeding forty (40) active and eligible players, whom the club desires to reserve for the ensuing season; and also a list of all its players who have been promulgated as placed on the Military, Voluntarily Retired,

If it chooses, a club may assign a player's contract to another club without consulting the player or obtaining his consent.[7] Should his contract be assigned his new club becomes heir to all of the above-mentioned rights and obligations vis-a-vis the player.[8] If a player refuses to sign his contract and play, as Flood has, he is placed on a Restricted List whereby the club last holding his contract, in this case Philadelphia,[9] retains the exclusive right to

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Restricted, Disqualified, Suspended or Ineligible Lists; and such players signed under Rule 4 who do not count in the club's under control limit. * * * [N]o player on any list shall be eligible to play for or negotiate with any club until his contract has been assigned or he has been released." -

Of the forty active players on a club's reserve list, fifteen are generally minor league players since a major league team may have a maximum of twenty-five players on its active roster. Major League Rule 2. There are more players in the minor leagues than these remaining fifteen players reserved by each major league club. These minor league players who are not reserved by a major league club may in turn be reserved by their minor league club. Professional Baseball Rules 2 and 4-A. Such players are also subject to an annual draft by all the major league clubs. Rule 5 of the Major League and Professional Baseball Rules.

[7] Rule 9 of the Major League and Professional Baseball Rules provides in part:

"A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment is by his contract [paragraph 6(a) of the Uniform Players Contract] bound to serve the assignee."

[8] Rule 9 of the Major League and Professional Baseball Rules further provides in part:

"After the date of such assignment all rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club except as otherwise provided in Rule 4. * * *"

[9] By virtue of the assignment of Flood's contract by St. Louis to Philadelphia and the exercise by Philadelphia of its option to renew.

negotiate with the player.[10] Only if released does a player become a free agent; he cannot achieve such status by his own choosing.[11]

Plaintiff's witnesses in the main concede that some form of reserve on players is a necessary element of the organization of baseball as a league sport, but contend that the present all-embracing system is needlessly restrictive and offer various alternatives which in their view might loosen the bonds without sacrifice to the game.[12] Plaintiff points to the present experience of other professional sports such as football, basketball and hockey, each of which survives relatively comfortably with a reserve system or organizational structure whose elements to a varying extent offer more freedom of choice and flexibility to its players. Tr. 448-590 (see especially: football, Tr. 463, 466-67, 480, 490; basketball, Tr. 520-23; hockey, Tr. 552-53, 559-60, 569, 572, 577, 582-84, 587); Plaintiff's Exhibits 12, 13, 14, 16, 17, 18, 19 and 20 in evidence.

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[10] Rule 15, Major League and Professional Baseball Rules.

[11] Before a player may be unconditionally released and his contract terminated he must be placed on waivers making his contract available to every other major league club. Major League Rule 8. See also, Uniform Player Contract, paragraph 7.

[12] Modifications of and alternatives to the present reserve system suggested by plaintiff include: (a) independent competitive leagues; (b) limitation of club control over a player to a fixed term of years; (c) permitting a player to become a free agent after an option period; (d) trade veto for veteran players; (e) minimum salary progression; (f) reduction in the number of reserved players; (g) salary arbitration. Consideration was given them both individually and in combination. Various refinements were advanced to meet certain objections raised as to proposals (b) and (c), including a right of first refusal given to the player's club to match any offer obtained by the player, a restriction of negotiations to only clubs in the other league and then only in the off-season, and/or a more equalized division of baseball revenues among clubs. See Tr. 221-22, 235, 237-38, 247, 255-58, 1966-67, 1981-84, 1985-86, 2020-23.

The defendant clubs and Commissioner of Baseball, on the other hand, contend that the restrictions of the present system are reasonable and necessary to preserve the integrity of the game, maintain balanced competition and fan interest, and encourage continued investment in player development; that none of the alternatives suggested by plaintiff would be workable and still satisfy all three of these criteria; and that, upon comparison, baseball with its player safeguards [13] is hardly more restrictive in its reserve system than are the other professional sports. See Tr. 652-913, 932-1121, 1232-1545. Defendants point to the instability in the early history of baseball and before institution of the reserve system as evidence of the danger to be anticipated from any modification of its substance. See Plaintiff's Exhibit 15-A in evidence (the Cellar Report entitled "Organized Baseball," Subcommittee on the Study of Monopoly Power of the Committee of the Judiciary of the House of Representatives, 82nd Cong., 2d Sess. (1952)).

The Reserve System—a Necessity?

Prior to trial we gained the impression that there was a view, held by many, that baseball's reserve system had occasioned rampant abuse and that it should be abolished. We were struck by the fact, however, that the testimony at trial failed to support that criticism; we find no general or widespread disregard of the extremely important position the player occupies. Cf. note 16, *infra*.

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[13] Defendants include the following safeguards of fair treatment: (a) the forty player reserve limit (Major League Rule 4-A); (b) the waiver rules (Major League Rule 10); (c) the minor league draft (Major League Rule 5); (d) the maximum permissible salary cut provision (Uniform Player Contract, para. 10); (e) termination pay (Uniform Player Contract, para. 7); (f) the requirement of consent before assigning a veteran to the minor leagues (Major League Rule 9(g)); (g) the minimum salary provision (Uniform Player Contract); (h) Major League Baseball Players Benefit Plan.

Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself,[14] it shows that even plaintiff's witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious. It lends support to our view, expressed at another point in this opinion, that arbitration or negotiation would extract such troublesome fault as may exist in the present system and, preserving its necessary features, fashion the reserve clause so as to satisfy all parties.

Thus, former baseball star Jack (Jackie) Robinson responded to questioning in this regard as follows:

> "Q. Do I understand, however you interpret the expression 'reserve clause' or 'reserve system,' that your testimony is that you favor modification of that system? Is that right?
>
> A. [Robinson] That is correct, I do.
>
> Q. You don't favor destruction of the system, do you?
>
> A. No, Sir." Tr. 217. See Tr. 218-19. See also Tr. 198, 216.

Witness Henry (Hank) Greenberg, also a former star player, was of the opinion:

> "I think the players themselves, having functioned under the reserve system all these years, recognize the fact that the club has some equity in the players' services. * * *" Tr. 247. See also, Tr. 236, 248.

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[14] Flood stated near the close of his testimony, "I would like the whole system to be struck down and declared illegal," adopting as his view the proposition that "no provision in that system * * * is beneficial either to the players or to organized baseball." Tr. 118 and 121.

And former club owner William Veeck declared:

> "Well, the complete elimination of the reserve system or the reserve clause in contracts I think would not be helpful to baseball. I am afraid that if you suddenly terminated and there was no control of contracts by any club, that it could—and I say only could—result in some rather chaotic conditions. I feel, however, that this would not be the case if it were done in an orderly fashion.
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> * * * * * *
>
> I feel that there should be some kind of a contractual relationship extending over a period of years. * * * I don't mean it should stop and there should be nothing in its place." Tr. 1965, 1966.

The Federal Antitrust Claim

The Supreme Court held in 1922 that professional baseball was not within the scope of the federal antitrust laws because the exhibitions were purely state affairs to which the interstate transportation of players was merely incidental and were not trade or commerce in the ordinarily accepted use of the words. Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 42 S.Ct. 465, 66 L.Ed. 898 (1922).

When this question again reached the Supreme Court in 1953, intervening decisions appeared to have vitiated any holding that baseball was not subject to the antitrust laws because its activities either did not sufficiently affect or were not interstate commerce. See Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949). Without reexamining this underlying issue of interstate commerce, however, the Supreme Court reaffirmed its prior decision in *Federal Baseball* "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." Toolson v. New York Yankees, Inc., 346 U.S. 356, 74 S.Ct. 78, 98

L.Ed. 64 (1953). The reasons assigned for that conclusion were that baseball had developed for thirty years in reliance on its "understanding that it was not subject to existing antitrust legislation"; that Congress had not seen fit to bring baseball under the antitrust laws "by legislation having prospective effect"; that the existing legislation should not be held applicable with "retrospective effect"; and that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation."

Subsequent decisions established that *Toolson* "was a narrow application of the rule of *stare decisis*" applicable only to baseball and to no other industry or professional sport. Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957); United States v. International Boxing Club, 348 U.S. 236, 75 S.Ct. 259, 99 L.Ed. 290 (1955); United States v. Shubert, 348 U.S. 222, 75 S.Ct. 277, 99 L.Ed. 279 (1955). Specifically, four years after *Toolson*, the Supreme Court held the antitrust laws applicable to professional football and its reserve system, while continuing to distinguish baseball as the only sport encompassed within its prior contrary determination in *Federal Baseball*. See Radovich v. National Football League, *supra*.

In brief, plaintiff asserts the following in support of his contention that these decisions do not bar this Court from anticipating their demise and granting him relief:

> "Changes in baseball since 1922, or even since 1953, have thrust the game squarely within contemporary concepts of interstate commerce. And the reliance interests of the team owners, when properly analyzed in light of the liberalized doctrine allowing prospective relief and the plaintiff's request for only such relief, present no barrier. Finally, the silence of Congress since 1953 argues for, rather than against, a judicial reexamination of the discretionary judgment exercised

in *Toolson*." Plaintiff's Post-Trial Brief, July 7, 1970, p. 47.

In our decision of March 4, 1970 denying plaintiff a preliminary injunction, we considered in some depth these and certain other arguments made by plaintiff and concluded that "several weighty factors compel the conclusion that the overruling of *Toolson* is by no means the probable result of this litigation." Flood v. Kuhn, 309 F.Supp. 793, 801-805 (S.D.N.Y. 1970). In general, we based this conclusion on the fact that *Toolson* held Congress had no intention to bring baseball within the antitrust laws, and did not rest on any presumed absence of interstate commerce; that prospective relief of the nature envisaged by plaintiff would be unprecedented; that, in any event, such court-imposed relief might still have a serious retrospective effect on the reliance interests of baseball; that the continued silence of Congress may take on aspects of ratification in light of the importance attached thereto in these decisions of the Supreme Court; and, finally, that "decisions of the Supreme Court are not lightly overruled, particularly those which have a history as long as this one * * * whatever may be out view of the rightness of plaintiff's claim. * * *" We find the trial before us amplifies those expressed views.

Subsequent to our determination of the motion for a preliminary injunction and to the trial of the issues herein, we were supported in these same views by the recent decision of our Circuit in Salerno and Valentine v. American League of Professional Baseball Clubs et al., 429 F.2d 1003 (2d Cir., July 13, 1970). *Salerno* is unquestionably conclusive, at least at this level, of the Federal antitrust issues herein. The panel in an opinion by Judge Friendly unanimously held:

> "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely

dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' Radovich v. National Football League, 352 U.S. 445, 452, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957). We add that Boys Mkts., Inc. v. Retail Clerks' Local 770, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199, decided June 1, 1970, overruling Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 82 S.Ct. 1328, 8 L.Ed.2d 440 (1962), despite Congress' failure to act on invitations to do so, may presage a change from the attitude with respect to such inaction that was expressed in *Toolson*, 346 U.S. at 357, 74 S.Ct. 78, which Mr. Justice Black in dissent invoked to no avail. However, putting aside instances where factual premises have all but vanished and a different principle might thus obtain, we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom. While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch."

[1, 2] *Salerno* mandates that plaintiff's federal antitrust claims be denied. Since baseball remains exempt from the antitrust laws unless and until the Supreme Court or Congress holds to the contrary, we have no basis for proceeding to the underlying question of whether baseball's reserve system would or would not be deemed reasonable if it were in fact subject to antitrust regulation.

Labor Antitrust Exemption

Despite our firm belief (as hereinafter advanced) that these issues can and should be resolved by negotiations

between the players and the club owners, we remain in doubt as to whether this matter stands exempt from the antitrust laws because it is a mandatory subject of collective bargaining. Defendants contend that a consistent application of Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965) admits of no other result. Plaintiff submits that defendants misread *Jewel Tea*; that "benefits to organized labor cannot be utilized as a cat's paw to pull employers' chestnuts out of the antitrust fires"; and that United States v. Women's Sportswear Mfr's Ass'n, 336 U.S. 460, 464, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949) requires rejection of an antitrust immunity for this reserve system created and imposed by the club owners long before the arrival of collective bargaining.

We need not reach this difficult question in light of our disposition that the Supreme Court alone is privileged to overrule *Toolson* and hold baseball subject to the antitrust laws.

State Law Claims

Plaintiff next asserts in two separate causes of action that the reserve system violates state law, both statutory and common. He argues that defendants cannot have it both ways; that if the federal antitrust laws do not reach baseball then state antitrust, civil rights and labor statutes and common law are applicable. We disagree.

Plaintiff would surely be correct if *Toolson* were no more than a reaffirmation of *Federal Baseball* based on a supposed absence of interstate commerce. However, *Toolson* cannot be so read. As our Circuit recently held, "the ground upon which *Toolson* rested was that Congress had no intention to bring baseball within the antitrust laws, not that baseball's activities did not sufficiently affect interstate commerce." Salerno and Valentine v. American League of Professional Basebal Clubs et al., *supra*.

[3] As interstate commerce, baseball is subject to regulation by Congress. Cf. American League and Ass'n of Umpires, 180 N.L.R.B. No. 30, Case 1-RC-10414 (December 15, 1969). It has been held exempt from existing antitrust legislation covering other related and integrated activities. It is not for this Court to write off *Toolson* as an anomaly. Its rationale must be given effect. We believe it unlikely that the Supreme Court would have held, as it did, that baseball's reliance interests precluded overruling *Federal Baseball* and that "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws," if it considered baseball vulnerable to state regulation. Enforcement of such state laws would appear to produce a result inconsistent with the objective of the federal antitrust laws interpreted by the Supreme Court as excluding the business of baseball.

Thus, we agree with the reasoning expressed by certain of the majority of the Supreme Court of Wisconsin in holding its state antitrust laws could not be applied to prevent transfer of a baseball club franchise:

> "The [United States Supreme] court has also said that while various tests may be used for guidance as to the regulatory power left to the states where Congress is silent, the ultimate question is whether the state action conflicts with national policy. • • •
>
> • • • • • • •
>
> The situation which confronts us is not one where Congress has been silent as to a particular type of regulation in a broad field of interstate commerce, where the proposition may readily be implied that although no need has been found for federal regulation, state regulation of local aspects may be quite appropriate. Rather, here, Congress has remained silent as to regulation of a particular industry, either by imposition of antitrust laws or otherwise, in the face of and seemingly in response to a series of judicial

decisions which uniquely and emphatically pose the question to Congress of whether there shall be regulation in antitrust terms or otherwise.

* * * * * * *

It is plausibily argued that silence of Congress in this context demonstrates congressional recognition that league structure and the related agreements and rules are integral parts of professional baseball as it exists, and that the application of the familiar type of antitrust legislation to the structural arrangements of organized baseball is inappropriate; * * * that there is to be self-regulation until such time as Congress decides that the public interest requires other control.

* * * * * *

* * * We deem it unrealistic to interpret these decisions of the Supreme Court of the United States plus the silence of Congress as creating a mere vacuum in national policy, leaving the states free to regulate the membership of the baseball leagues." State v. Milwaukee Braves, Inc., 31 Wis.2d 699, 144 N.W.2d 1, 16-18, cert. denied, 385 U.S. 990, 87 S.Ct. 598, 17 L.Ed.2d 451 (1966). See also, *id.* at n. 17.

[4] Although transfer of a team franchise is certainly distinguishable (particularly with regard to the likelihood of state discrimination in favor of its own economic interests) from restraints imposed by the reserve system upon players' freedom to negotiate, the reasoning of *Milwaukee Braves* is still persuasive here. The reserve system, which was the subject of Toolson's complaint, certainly falls squarely within the scope of baseball's federal antitrust exemption and, thus, within the area preempted from state regulation.

Even if the Supreme Court decisions and the silence of Congress fail to establish or indicate a national policy regarding baseball sufficiently certain to rise to the level of federal preemption, nevertheless we believe the nation-

wide character of organized baseball combined with the necessary interdependence of the teams requires that there be uniformity in any regulation of baseball and its reserve system. In *Milwaukee Braves* the other members of the majority preferred the view, at least as to matters such as league structure, that "since organized baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress." *Id.* at 18.

[5] We do not believe that the operation of baseball and its reserve system is a matter which admits of diversity of treatment. State and local laws may not unduly burden interstate commerce.

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. * * *
>
> But ever since Gibbons v. Ogden, [9 Wheat. 1, 6 L.Ed. 23,] * * *, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority. * * * Whether or not this long-recognized distribution of power between the national and the state governments is predicated upon the implications of the commerce clause itself * * *, or upon the presumed intention of Congress, where Congress has not spoken * * * the result is the same." Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 767-768, 65 S.Ct. 1515, 1519, 89 L.Ed. 1915 (1945).

As we see it, application of various and diverse state laws here would seriously interfere with league play and the

operation of organized baseball. Cf. American League and Ass'n of Umpires, *supra*.

Accordingly, plaintiff's state law claims, common law and statutory alike, must be denied. Just as we found it unnecessary to determine whether plaintiff's federal antitrust claims were barred by the labor antitrust exemption, so too, here, we need not resolve whether Local 24, International Brotherhood of Teamsters etc. Union v. Oliver, 358 U.S. 283, 296, 79 S.Ct. 297, 3 L.Ed.2d 312 (1959) applies and whether the federal labor law scheme leaves no room for the application of state antitrust policy to baseball's reserve system.

Involuntary Servitude Claim

[6] Plaintiff's fourth cause of action asserts that the reserve system violates the Thirteenth Amendment and its enforcing legislation which similarly prohibits holding any person to "involuntary servitude," 18 U.S.C. § 1584.[15] Although neither expressly provides for a civil remedy, jurisdiction to grant relief for a violation of such provision may be found in 28 U.S.C. §§ 1331 and 1343. See Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947); Bryant v. Donnell, 239 F.Supp. 681, 683 (W.D.Tenn. 1965). See also, Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Plaintiff acknowledges that this claim presents a case of first impression. He relies principally on a 1914 decision of a New York Supreme Court, American League Baseball Club v. Chase, 86 Misc. 441, 465, 149 N.Y.S. 6, 19 (1914),

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[15] Plaintiff's post-trial brief argues only that the reserve system creates a system of involuntary servitude. Apparently, he no longer contends either that such a system creates a condition of peonage, 18 U.S.C. § 1581 and 42 U.S.C. § 1994, or that it violates the public policy declared in the Norris LaGuardia Act; 29 U.S.C. §§ 102, 103. We have considered such sections nevertheless and have concluded that they have no application here.

which is quoted from at some length by Judge Frank in Gardella v. Chandler, 172 F.2d 402, 409-410 (2d Cir. 1949). However, Judge Frank recognized that terming the reserve system "peonage" was "perhaps a bit exaggerated" and concluded that "I am not to be understood as implying that [it] violate[s] the Thirteenth Amendment or the statutes enacted pursuant thereto." Gardella v. Chandler, *supra* at 410.

In Pollack v. Williams, 322 U.S. 4, 17, 64 S.Ct. 792, 799, 88 L.Ed. 1095 (1944), the Supreme Court, reviewing a state statute authorizing criminal sanctions against any person who fails to perform a personal service contract on which he has obtained an advance, stated that the "undoubted aim of the Thirteenth Amendment * * * was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States." Following that general proposition, the Supreme Court in *Pollock* specified its holding with respect to peonage and the Thirteenth Amendment:

> "Whatever of social value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service. This congressional policy means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor." *Id.* at 18, 64 S.Ct. at 799.

Similarly, with regard to involuntary servitude and the Thirteenth Amendment, the Supreme Court in Hodges v. United States, 203 U.S. 1, 16, 27 S.Ct. 6, 8, 51 L.Ed. 65 (1906) stated:

> "The things denounced are slavery and involuntary servitude. * * * All understand by these terms a condition of enforced compulsory service of one to another."

Our Circuit has held that threats of deportation in order to retain an employee's services do not constitute holding to involuntary servitude within the proscription of 18 U.S.C. § 1584, the statute relied on by plaintiff. See United States v. Shackney, 333 F.2d 475 (2d Cir. 1964). The court sought to avoid bringing the criminal law into play "whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful." *Id.* at 487. Involuntary servitude is defined therein as follows:

> "But a holding in involuntary servitude means to us action by the master causing the servant to have, or to believe he has, no way to avoid continued service or confinement, * * * " *Id.* at 486.

[7, 8] A showing of compulsion is thus prerequisite to proof of involuntary servitude. Concededly, plaintiff is not compelled by law or statute to play baseball for Philadelphia. We recognize that, under the existing rules of baseball, by refusing to report to Philadelphia plaintiff is by his own act foreclosing himself from continuing a professional baseball career, a consequence to be deplored. Nevertheless, he has the right to retire and to embark upon a different enterprise outside organized baseball. The financial loss he might thus sustain may affect his choice, but does not leave him with "no way to avoid continued service. * * * " *Id.* Therefore, as stated in Wicks v. Southern Pacific Co., 231 F.2d 130, 138 (9th Cir. 1956):

> "There is no contention that appellants cannot freely leave their employment with the railroads. * * * While leaving their present employment would entail serious losses in terms of seniority rights, medical benefits and retirement benefits, the fact remains that appellants are not being compelled or coerced to work against their will for the benefit of another."

Accordingly, we find that plaintiff has not satisfied the essential element of this cause of action, a showing of compulsory service.

The Conflicts Are Reconcilable

Before concluding this opinion, we wish to unburden ourselves of two strong and related convictions which we took away from this trial. First, despite the opposing positions of plaintiff and the Major League Baseball Players' Association on the one hand, the present management and club owners of organized baseball on the other, we found the witnesses appearing on behalf of both sides in the main credible and of high order; they have a genuine enthusiasm for baseball and with constancy have the best interests of the game at heart.[16]

Second, we are convinced that the conflicts between the parties are not irreconcilable and that negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned—in essence, what is called for here is continuity with change.

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[16] This is true no less of the club owners than of the players. Hall of Fame immortal Henry Greenberg who participated in baseball first as a player and then as an owner-manager stated, "[the public] has the idea that the owners are just people primarily interested in profits, no concern for the players, which is not true." Tr. 237. We found the testimony of Mr. Kauffman, owner of the Kansas City Royals, fairly reflective of club owners who appeared before us:

> "My number one reason for buying a baseball club was to help Kansas City retain it, and this was an opportunity for me to return to my community some of the benefits which I had reaped.
>
> No. 2 would be the pleasure involved in being a major league owner.
>
> No. 3 would be the prestige, and I presume this is approximate.
>
> And No. 4 would be because I felt I could make it profitable over a period of time. * * *" Tr. 1522.

This issue is not so unique or complex and the parties are not at such loggerheads that negotiations could not succeed. What we have already said under "The Reserve System, A Necessity?," effectively supports this conclusion. Trial testimony developed several proposed modifications that could serve as bases from which negotiations might proceed toward an accommodation of the valid interests of both sides. See note 12, *supra*.

Plaintiff's witnesses expressed a belief that this matter was capable of being resolved by good faith bargaining between the parties. Thus, Mr. Miller, executive director of the Major League Baseball Players' Association, recited the various modifications suggested by the players and declared a continuing desire to resolve this dispute. Tr. 1901. He summed up the Association's bargaining position at the various meetings held with management regarding the reserve system as follows:

> "Basically • • • it was our position that the reserve rule system was illegal in that its restrictions were just about total, that it was inconceivable to us that you could have a game of baseball with no rules, but that it seemed quite reasonable to us that modifications which were less restrictive than the present system could be made, were practical, and presumably could make the system safe from attack in terms of its illegality." Tr. 1904.[17]

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[17] Further, Mr. Greenberg testified on plaintiff's behalf:

> "• • • I think that the players recognize that the club should have some hold on them and I feel that it should be very simple to negotiate a term of a period of time in which the player is signed to a club and he has no rights to leave until that period has expired.
>
> • • • • •
>
> • • • I think it can be done in many, many ways and the game would continue to function and operate and the players

The Major League Baseball Players' Association, organized in 1954, has proved a particularly effective bargaining representative obtaining since 1966 highly significant benefits for the players in such areas as pensions, life and disability insurance, health care, minimum salary, arbitration of grievances, expense allowances, maximum permissible salary cut, termination pay, representation at individual salary negotiations, negotiation of rule changes affecting player benefits or obligations, due process in player discipline. See Defendants' Feeney Exhibits F, M and N in evidence. Both management and the Players' Association recognize the reserve system to be a mandatory subject of collective bargaining. The National Labor Relations Board asserted jurisdiction over organized baseball in December, 1969.

The history of negotiations to date does not appear to us to establish, as plaintiff appears to contend, that organized baseball refuses to bargain with regard to the reserve system and will accept no modification of its structure unless forced to do so by the courts or by Congress. In the first place, several of the benefits mentioned above are directed at alleviating some of the undesirable side effects of the reserve system. Moreover, serious negotiations aimed at the core of this system are of quite recent origin and the failure to reach a quick accord should not be seen, in our opinion, as indicating intransigence on either or both sides.

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would be probably more satisfied and I think it would be best for all interests concerned." Tr. 247, 248.

In this same vein, Mr. Veeck, a former club owner long associated with baseball called by plaintiff as a rebuttal witness, asserted:

"* * * I don't believe that most athletes want anything but a change, a small change, a step in a direction. * * *" Tr. 1976.

Finally, cross-examination of plaintiff elicited:

"Q. And if Mr. Miller succeeded in inducing the clubs to modify the reserve clause, would you drop this lawsuit?

A. [Flood] Yes, I would." Tr. 116.

While it is true the owners have continued to support the status quo of the reserve system and have been critical of the various proposals by the Players' Association for its elimination or modification, they have not closed the door entirely on various suggestions made during negotiations in the immediate past in efforts to ameliorate the objectionable features of the reserve clause. Indeed, Commissioner Kuhn in his testimony at this trial indicated that, "changes that could be made are changes that are best bargained out between parties that are involved here * * * *" And representatives of the club owners expressed substantially similar views.[18]

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[18] In August, 1967 the Players' Association included within its Statement of Policy, containing various proposals for discussion with the club owners, a passage broadly stating that the reserve system is of doubtful legality and calling for a reasoned, open-minded approach toward some accommodation. Defendants' Feeney Exhibit O; pp. 5-6. The first Basic Agreement between the clubs and the Players' Association executed on February 19, 1968 provided for a joint study of the reserve system during the two year term of the agreement. Defendants' Feeney Exhibit F, Article VIII. At least four meetings were held at which ideas were discussed but no specific proposals made. Tr. 1593-94, 1918. No joint report issued, but the Players' Association prepared a written critique of the rseerve system on June 27, 1969. Defendants' Feeney Exhibit Q in evidence.

On August 29, 1969, the Players' Association submitted proposals for various changes in the Basic Agreement. With respect to the reserve system, its very general proposal sought only "alternative provisions" which would be legal, reasonable, and responsive to the legitimate interests of players and club owners. Defendants' Feeney Exhibit P, pp. 1-2. On October 31, 1969, the Players' Association made, apparently for the first time, a specific proposal in the nature of a binding offer for change in the reserve system. Defendants' Feeney Exhibit R in evidence. This proposal for free agency status for players every three years with the original club retaining a right of first refusal was rejected by the clubs in December, 1969. Tr. 1607. Thereafter, other modifications suggseted by the players including the National Football League option clause were discussed. The club owners continued to take

In such matters as labor relations and family disputes, to name just two, Congress (in the case of collective bargaining) and the courts have determined that such disputes as do arise therein are best resolved by the parties without outside interference and that resort to a court-imposed solution should be a matter of last resort. This is almost invariably the case whenever two parties must continue to work together amicably toward a common end after the

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a bargaining position in support of the status quo. Discussions continued on all aspects of the new agreement including the reserve system until February 19, 1970 when the Players Association and the clubs, with the final termination date of the old agreement drawing near, stipulated that neither party would be required to bargain on the reserve system until the instant lawsuit is finally adjudicated or discontinued. Defendants' Feeney Exhibit N, Attachment B, in evidence. This is the posture in which matters still stand. While defendants continued to support the status quo and to criticize the modifications suggested by plaintiff at trial, they also reflected a readiness to continue to negotiate toward an accommodation. Commissioner Kuhn testified:

> "Obviously the changes that could be made are changes that are best bargained out between parties that are involved here, such as the clubs and the players. * * * There have been many changes in the workings of the waiver rule, changes in the workings of the option provision, changes in the workings of the minimum salary provisions and so forth.
>
> The reserve system has been an evolving system, and I expect it to continue to be an evolving system." Tr. 806.

Mr. Feeney, President of the National League, affirmed the following:

> "Q. Now, Mr. Greenberg testified that, 'the reason for my being here, Judge, is that I think this has to be worked out between the owners and the players.'
>
> Wouldn't you agree with Mr. Greenberg on that point?
>
> A. [Feeney] Yes, I would." Tr. 985.

American League President Joseph Cronin noted:

> " * * * one of the things [the late owner of the Washington Senators] taught me was to always keep negotiations going.

dispute is settled. This is not to hold that the court should adopt a similar hands-off approach toward this case. Nevertheless, we believe that here, as well, the parties themselves are best able to reach a satisfactory accord, and that all avenues toward such an approach certainly have not yet been fully exhausted.

From the trial record and the sense of fair play demonstrated in the main by the witnesses on both sides, we are convinced that the reserve clause can be fashioned so as to find acceptance by player and club.

Far more complicated matters accompanied by an exclusive self-centered concern and by seemingly hostile and irreconcilable attitudes, frequently find their way to amicable adjustment and the abandonment of court claims. Why not here—with the parties positive and reasonable men who are equally watchful over a common objective, the best interests of baseball?

Conclusion

For the first time in almost fifty years opponents and proponents of the baseball reserve system have had to make their case on the merits and support it with proof in a court of law. As a long line of litigation and congressional

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* * * Never say take it or leave it. Always say 'might consider,' and that is the practice I have maintained throughout my years in baseball.". Tr. 1192.

Mr. Gaherin, chief negotiator for the club owners, responded affirmatively when asked if "the clubs recognize that the reserve system is a mandatory subject of bargaining upon which the clubs are legally obligated to bargain with the [Players'] Association." Tr. 1579. Further on he opined:

> "* * * we certainly have all of the ability in the two sides to sit down and in the free area of collective bargaining resolve a matter of this nature.
>
> And I may say parenthetically, if I may, Judge, we are quite willing to do so." Tr. 1616.

inquiry attests, this system has often been a center of controversy and a source of friction between player and club. Existing and, as we see it, controlling law renders unnecessary any determination as to the fairness or reasonableness of this reserve system.[19] We are bound by the law as we find it and by our obligation to "call it as we see it."

Although a resolution of the merits of the reserve system would be inappropriate at this time, it is nevertheless our hope that by obtaining a complete record covering not only the threshold question of whether plaintiff states a cause of action, but the merits of his claims as well, we may have obviated the possibility of piecemeal determinations and consequent delay.

The foregoing opinion constitutes this Court's findings of fact and conclusions of law pursuant to Rule 52(a), F.R.Civ.P.

For the reasons already set forth, the Clerk is directed to enter judgment in favor of defendants and against plaintiff on each cause of action herein.

So ordered.

[19] Admission into evidence of plaintiff's exhibits 28, 29 and 34 for identification is contested. Since we do not reach the merits of the reserve system, resolution of their admissibility is unnecessary. Assuming *arguendo* that such exhibits were in evidence, our decision herein would be unaffected.

APPENDIX C

Judgment

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of April one thousand nine hundred and seventy-one.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. WILFRED FEINBERG,
Circuit Judges.

CURTIS C. FLOOD, *Plaintiff-Appellant,*

v.

BOWIE K. KUHN, Individually and as Commissioner of Baseball, et al., *Defendants-Appellees.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

[Docketed May 12, 1971]

APPENDIX D

Constitution and Statutory Provisions Involved

U. S. CONST., ART. I, Sec. 8:

> "The Congress shall have power . . . to regulate Commerce with Foreign Nations, and among the several States, and with Indian Tribes . . . ."

Section 1 of the SHERMAN ACT, 15 U.S.C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

Illustrative State Statutes

DISTRICT OF COLUMBIA:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or in the District of Columbia, or in restraint of trade or commerce between . . . the District of Columbia and any State or States or foreign nations, is declared illegal." 15 U.S.C. § 3.

CALIFORNIA:

> "Contracts void. Except as provided in this chapter, every contract by which anyone is restrained in engaging in a lawful profession, trade or business of any kind is to that extent void." Section 16600, Cal. Business & Professional Code.

MICHIGAN:

> "All combinations of persons, copartnerships, or corporations made . . . for the purpose . . . of establishing and maintaining . . . a monopoly of any trade, pursuit, avocation, professional or business, are hereby declared to be against public policy, illegal and void." Mich. Ann. Laws § 28.62.

Supreme Court, U.S.
FILED
AUG 26 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD,

Petitioner,

v.

BOWIE K. KUHN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

	PAGE
Opinions Below	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
The Facts	2
The Complaint	3
The Proceedings Below	4
Argument	
I. This Court Has Held That The Business Of Baseball Is Not Subject To The Federal Antitrust Laws, Unless And Until The Congress Determines Otherwise	6
A. Since 1922 Baseball Has Been Held Not Subject To The Federal Antitrust Laws	6
B. Congress Has Considered Baseball's Exemption And Determined Not To Disturb It	8
C. Baseball Has Grown And Developed In Reliance Upon Its Exemption	10
D. The Changes In Baseball Since 1953 Support, Rather Than Undermine, The *Toolson* Ruling	13
E. The *Toolson* Ruling Has Not Been Abused By Baseball	15

PAGE

II. Neither the Business Of Baseball Nor Its Reserve System Are Subject To State Anti-trust Regulation 16

Conclusion 20

Appendix A 22

CITATIONS

Table of Cases

American League and Ass'n of Umpires, 180 NLRB No. 30, Case 1-RC-10414 (Dec. 15, 1969) 16

Blonder-Tongue Labs v. *University of Illinois Foundation,* 402 U.S. 313 (1971) 9

Boys Markets, Inc. v. *Retail Clerks Union Local 770,* 398 U. S. 235 (1970) 9

Federal Baseball Club of Baltimore v. *National League,* 259 U. S. 200 (1922) 6, 7

Flood v. *Kuhn, et al.,* 309 F. Supp. 793 (S.D.N.Y. 1970) 1, 4, 12, 13, 17

Flood v. *Kuhn, et al.,* 312 F. Supp. 404 (S.D.N.Y. 1970) 1, 4, 13

Flood v. *Kuhn, et al.,* 316 F. Supp. 271 (S.D.N.Y. 1970) 1, 4, 5, 10, 12-18, 20

Flood v. *Kuhn, et al.,* 443 F.2d 264 (2d Cir. 1971) 1, 5, 12, 18

Radovich v. *National Football League,* 352 U. S. 445 (1957) 7, 8, 11, 12, 16

Salerno v. *American League of Professional Baseball Clubs,* 429 F. 2d 1003 (2d Cir. 1970), *cert. denied,* 400 U. S. 1001 (1971) 4, 5

Southern Pacific Co. v. *Arizona,* 325 U. S. 761 (1945) 18-20

Toolson v. *New York Yankees, Inc.,* 346 U. S. 356 (1953) 2, 4-8, 10-13, 15-17

PAGE

United States v. *International Boxing Club of New York*, 348 U. S. 236 (1955) 7

United States v. *Shubert*, 348 U. S. 222 (1955) 7, 16

Wisconsin v. *Milwaukee Braves, Inc.*, 31 Wisc. 2d 699, 144 N.W. 2d 1 (1966), *cert. denied*, 385 U. S. 990 (1966) 10, 17, 18

Other Citations

U.S. Const., Art. I, § 8 2

U.S. Const., Art. VI, cl. 2 ..... 2, 5

15 U.S.C. § 1 2

15 U.S.C. §§ 1291-95 9

IN THE

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OCTOBER TERM, 1971

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CURTIS C. FLOOD,

Petitioner,

v.

BOWIE K. KUHN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION*

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. B of Petition) is reported at 316 F. Supp. 271 (1970). The opinion of the Court of Appeals for the Second Circuit (App. A of Petition) is now reported at 443 F.2d 264. Interlocutory opinions of the United States District Court for the Southern District of New York are reported at 309 F. Supp. 793 (1970) and 312 F. Supp. 404 (1970).

* The Commissioner of Baseball, Bowie K. Kuhn, is joined as a defendant in only the first alleged cause of action, the federal antitrust claim. Counsel for the Commissioner therefore join in this brief only to the extent that it deals with that claim.

Questions Presented

1. Should this Court overturn its decision in *Toolson* v. *New York Yankees, Inc.* 346 U.S. 356 (1953), holding that professional baseball is not within the scope of the federal antitrust laws unless and until the Congress determines otherwise, when the history of Congressional consideration of baseball supports the continuation of that exemption?

2. Should the nationwide framework of baseball which is the subject matter of this action be made subject to regulation under the antitrust laws of the various states in which baseball operates?

Constitutional and Statutory Provisions Involved

The pertinent provision of the Sherman Act (15 U.S.C. § 1) is set forth in Appendix D to the Petition. Also involved are Article I, Section 8 and Article VI, clause 2 of the United States Constitution which are set forth in Appendix A annexed hereto.

Statement of the Case

The Facts

On or about October 8, 1969, the player contract of Petitioner, Curtis C. Flood, was assigned by the St. Louis Cardinals to the Philadelphia Phillies, pursuant to existing baseball rules and the terms of his contract. The assignment of Mr. Flood's contract was part of a multi-player transaction which included the assignment of other player contracts between the Phillies and the Cardinals.

Mr. Flood refused to honor the assignment of his contract and, on December 24, 1969, he asked the Commissioner of Baseball to advise all of the major league clubs that he was entitled to negotiate with all clubs in both of the major

leagues. The Commissioner responded by advising Mr. Flood that since his contract had been properly assigned in accordance with its provisions, his request could not be granted. Thereafter this action was commenced and Petitioner declined the Commissioner's invitation to discuss the matter further (Tr.* 136-37).

Petitioner, through his attorneys, who had been retained for him by the Major League Baseball Players Association, repeatedly refused to play during the 1970 season, at the $100,000 salary offered by the Philadelphia club, despite Respondents offer that he could play without prejudice to this action (Tr. 372-73). After the close of the 1970 season, the Philadelphia club assigned the rights to Mr. Flood's contract to the Washington Senators. In November 1970 Petitioner and the Washington club entered into a contract whereby Mr. Flood agreed to play for the Senators during the 1971 baseball season for a salary of $110,000. By agreement among the parties this was without prejudice to Petitioner's rights in this litigation. However, on April 27, 1971 Mr. Flood left the Washington club despite the club's objections, citing personal reasons, and has not played since that date.

The Complaint

Petitioner's complaint, insofar as it pertains to questions presented to this Court, consists of allegations that baseball's reserve system constitutes a conspiracy among the Respondents to boycott Petitioner in violation of the Sherman Act (Complaint, par. 22). In addition, in causes of action directed against only eleven of the twenty-four club Respondents and none of the individual Respondents, Petitioner contends that the reserve system and the Respondents' practices thereunder constitute violations of the

* Refers to trial transcript as originally paginated.

laws of New York, California and the "several states" in which major league baseball is played (Complaint, par. 28).

The Proceedings Below

Simultaneously with the service of the Complaint, on January 16, 1970, Petitioner served an order requiring the club Respondents to show cause why a preliminary injunction should not be entered enjoining them from refusing to offer Petitioner employment. On March 4, 1970, the District Court denied this application with an opinion reported at 309 F. Supp. 793.

On April 23, 1970, the District Court entered an order granting Respondents' motion for summary judgment as to a cause of action involving only two Respondent clubs and deferring action on Respondents' motions to dismiss the remaining causes of action alleged in the Complaint. The District Court observed that, as to the first cause of action, asserting violation of the federal antitrust laws, "plaintiff asserts grounds for overruling *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), which in our view raise serious questions of a factual nature" and referred to other issues best resolved after consideration of all the facts adduced at trial. 312 F. Supp. at 406.

After a trial which lasted fifteen days, the District Court rendered a decision and entered judgment finding for Respondents on each of the remaining alleged causes of action. The opinion is reported at 316 F. Supp. 271.

The District Court dismissed the federal antitrust claim citing *Toolson* v. *New York Yankees, Inc.*, *supra*, and *Salerno* v. *American League of Professional Baseball Clubs*, 429 F. 2d 1003 (2d Cir. 1970), *cert. denied*, 400 U. S. 1001 (1971).

The District Court also rejected Petitioner's state law claims holding (1) that the application of the state antitrust laws to baseball conflicts with the federal policy manifested by *Toolson* and Congressional consideration of baseball and, therefore, violates the Supremacy Clause of the Constitution (Art. VI, cl. 2), and (2) that "the nationwide character of organized baseball combined with the necessary interdependence of the teams requires that there be uniformity in any regulation of baseball and its reserve system." 316 F. Supp. at 279-80.*

Finally, the District Court pointedly observed that the evidence before it indicated that the issues presented by the Complaint were the kind "best resolved by the parties without outside interference" and that the parties' representatives in collective bargaining, sharing a common interest in the good of the game, were capable of a negotiated resolution of their differences. 316 F. Supp. at 282, 284.

On April 7, 1971, the Court of Appeals for the Second Circuit unanimously affirmed the District Court's decision (1) as to the federal antitrust claim, on the authority of *Toolson* v. *New York Yankees, Inc., supra,* and *Salerno* v. *American League of Professional Baseball Clubs, supra,* and (2) as to the state law causes of action, because the extra-territorial effect of state regulation on the multi-state structure of baseball would constitute an impermissible burden on interstate commerce. 443 F.2d at 267-8.

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* The District Court also rejected Petitioner's Thirteenth Amendment arguments because he was free not to play professional baseball and thus there was no compulsion, a prerequisite of involuntary servitude. 316 F. Supp. at 280-82. The Court of Appeals affirmed the District Court's decision and the Petition does not present the Thirteenth Amendment contentions to this Court.

ARGUMENT

I.

This Court Has Held That The Business Of Baseball Is Not Subject To The Federal Antitrust Laws, Unless And Until The Congress Determines Otherwise.

A. *Since 1922 Baseball Has Been Held Not Subject To The Federal Antitrust Laws.*

Ever since *Federal Baseball Club of Baltimore* v. *National League,* 259 U. S. 200 (1922), professional baseball has been held not subject to the operation of federal antitrust laws.

In 1953, in *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356 (1953), an action like this one by a player challenging baseball's reserve system, this Court affirmed baseball's antitrust exemption as follows:

> "In *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without reexamination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Profes-*

> *sional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S. at 356-57.

Subsequent decisions of this Court have reaffirmed the rationale of *Toolson*. In 1955 this Court, in two different cases, restated the proposition that if the business of organized baseball is to be brought within the scope of the federal antitrust laws, the Congress, and not the Courts, must do it. *United States* v. *Shubert*, 348 U. S. 222 (1955); *United States* v. *International Boxing Club of New York*, 348 U. S. 236 (1955).

In 1957, this Court held that professional football was subject to the antitrust laws and that the rule established in *Federal Baseball* and *Toolson* was to be limited to organized baseball. *Radovich* v. *National Football League*, 352 U. S. 445 (1957). With respect to the *Toolson* rule, the Court said that: "[a]s long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the [Sherman] Act made in those cases." 352 U. S. at 451. In considering the issue of whether discrimination in favor of baseball was not created by such a ruling, this Court referred again to the role of the Congress:

> "We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by Court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action. Of course, the doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance. This is not a new approach." (Footnote omitted.) 352 U. S. at 452.

These opinions made it manifest that baseball was considered to be engaged in interstate commerce and fully subject to any appropriate federal regulation which might be enacted. Both the District Court and Court of Appeals recognized this fact and Respondents make no argument to the contrary.

But Petitioner continues to argue that baseball claims immunity from both federal and state law and that the Respondents cannot have it both ways and be immune from all regulation (Petition, pp. 19-20). This contrived contention is simply answered: Congress can assert federal regulatory power over baseball at any time.

B. *Congress Has Considered Baseball's Exemption And Determined Not To Disturb It.*

The Petition is devoid of any reference to the extensive Congressional examination of baseball since *Toolson* and disregards this Court's determination that Congress is the proper forum for any reconsideration of baseball's status.

Since November 1953, when the *Toolson* opinion was handed down, there have been over 50 bills introduced into Congress dealing with the applicability of the antitrust laws to organized baseball. Since the *Radovich* decision in 1957 more than eight separate Congressional hearings, totaling more than forty days of testimony, have been held.*

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* *See, e.g., Hearings on H.R. 5307, et al., Before the Antitrust Subcomm. of the House Judiciary Comm.*, 85th Cong., 1st Sess. (1957); *Hearings on H.R. 10378 and S. 4070 Before Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 85th Cong., 2nd Sess. (1958); *Hearings on S. 616 and S. 886 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 86th Cong., 1st Sess. (1959); *Hearings on S. 3483 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 86th Cong., 2d Sess. (1960); *Hearings on S. 2391 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 88th Cong., 2d Sess. (1964); *Hearings on S. 950 Before the Subcomm. on Antitrust & Monopoly of the Senate Judiciary Comm.*, 89th Cong., 1st Sess. (1965).

Baseball's antitrust exemption has continued unchanged throughout this thorough Congressional examination. In fact, the result of such Congressional activity has been a repeated reaffirmation of baseball's position. The only two bills which have passed either house (H.R. 10378, 85th Cong. 2d Sess. (1958); and S. 950, 89th Cong. 1st Sess. (1965)) both provided broad antitrust exemptions to the principal professional league sports, including a specific exemption with respect to "the employment, selection or eligibility of players, or the reservation, selection, or assignment of player contracts."* As the Senate Committee on the Judiciary concluded in its 1965 report on a proposed "Professional Sports Act": the antitrust exemption for a reserve system is "necessary to maintain competitive equality among the member clubs and leagues." Senate Report No. 462, 89th Cong. 1st Sess. (1965), p. 13. When Congress has enacted legislation in the professional sports area, the effect of such legislation has been to codify or grant an antitrust exemption, not eliminate it. Sports Broadcasting Act of 1961, 15 U.S.C. § 1291-95; professional football merger authorization of 1966, 15 U.S.C. § 1291.

This situation is not even remotely like those presented by *Blonder-Tongue Labs* v. *University of Illinois Foundation*, 402 U. S. 313 (1971) and *Boys Markets, Inc.* v. *Retail Clerks Union Local 770*, 398 U. S. 235 (1970), where this Court concluded that the failure of Congress to enact legislation contrary to certain earlier decisions of the Court did not provide a sufficient reason for refusing to reconsider such decisions. In neither *Blonder-Tongue Labs* nor *Boys Markets* did this Court expressly invite Congressional attention to the subject or indicate that the ruling of the Court would stand unless and until Congress determined otherwise. Nor in either case was there a history of Con-

* Neither of these bills came to a vote in the other house of Congress.

gressional consideration focused precisely on the issue and a record of Congressional committee findings favorable to the Court rulings in question. Moreover, in neither case were there considerations of reliance and retrospective application such as motivated the Court in *Toolson* to defer to the more accommodative legislative processes.

By contrast, this Court's express invitation to Congress to reconsider the *Toolson* exemption, the extensive and favorable consideration of baseball by Congressional committees and the failure of Congress to enact legislation disturbing baseball's exemption are highly significant and provide solid support for the continuation of the *Toolson* ruling. The District Court recognized this significance and quoted with approval these words of the Wisconsin Supreme Court, in *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wisc. 2d 699, 144 N.W. 2d 1, 16-18, *cert. denied*, 385 U. S. 990 (1966), on the subject:

> "'It is plausibly argued that silence of Congress in this context demonstrates congressional recognition that league structure and the related agreements and rules are integral parts of professional baseball as it exists, and that the application of the familiar type of antitrust legislation to the structural arrangements of organized baseball is inappropriate; . . . that there is to be self-regulation until such time as Congress decides that the public interest requires other control.'" 316 F. Supp. at 279.

C. *Baseball Has Grown And Developed In Reliance Upon Its Exemption.*

Also central to this Court's decision in *Toolson* was recognition of the reliance interests which would be jeopardized by a repudiation of baseball's exemption:

> "The business [of baseball] has . . . been left for thirty years to develop, on the understanding that it

was not subject to existing antitrust legislation." 346 U. S. at 357.

In *Radovich,* the Court reiterated this point:

> "Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." (Footnote omitted.) 352 U. S. at 450-51.

There have been seventeen more years of growth and expansion of baseball, in reliance on *Toolson,* since that decision by this Court in 1953. Baseball clubs have continued since *Toolson* and *Radovich* to invest millions of dollars in player contracts and other baseball assets (Plaintiff's Exs. 10-11), long term stadium leases have been entered into (Tr. 1302, 1454-58, 1752), new franchises have been acquired at costs reaching ten million dollars each (Plaintiff's Exs. 10-11) and countless other commitments have been made, all with awareness of and reliance upon baseball's antitrust exemption and in particular upon the validity of baseball's reserve system.

The testimony of various officers of club Respondents, Francis Dale of Cincinnati (Tr. 1239-44), John McHale of Montreal (Tr. 1313-19), Robert Reynolds of California (Tr. 1358-60) and Ewing Kauffman of Kansas City (Tr. 1451-53), all men who have purchased or participated in the purchase of major league clubs since *Toolson,* was unanimously and pointedly to the effect that the investments which they had made in baseball would never have

been made if the baseball business had not been protected by the *Toolson* ruling.

As Judge Moore, concurring below, noted:

> "Just as the Supreme Court in 1955 recognized that baseball 'had grown and developed' and 'in reliance on the *Federal Baseball* precedent,' *United States* v. *Shubert, supra,* 348 U. S. at 229, so much more has it grown between 1955 and 1971. The eight teams in each league have been expanded to twelve. . . . The reasons for adopting a 'hands off' policy by the courts of this particular sport have multiplied." 443 F.2d at 272.

In an attempt to overcome this obstacle to his assault on *Toolson,* Petitioner says that he seeks only prospective relief which would, he contends, eliminate the injustices of retroactivity and surprise referred to in the *Toolson* and *Radovich* decisions (Petition, p. 12). But no prospective decree of the nature sought by Petitioner, declaring him a free agent able to negotiate with all clubs, could fail to have enormous impact upon the reliance interests which *Toolson* protects. The grant of such relief to Petitioner would surely invite similar suits by other players and would profoundly disturb the structure and organization of professional baseball. The District Court rejected Petitioner's argument noting that "we do not believe the 'prospective' overruling suggested by plaintiff would vitiate all of these underpinnings of *Toolson*" (309 F. Supp. at 805) and that such relief would be "unprecedented" and "might still have a serious retrospective effect on the reliance interests of baseball. . . ." 316 F. Supp. at 277.

D. *The Changes In Baseball Since 1953 Support, Rather Than Undermine, The* Toolson *Ruling.*

Petitioner alleges that the changes in baseball since 1953 indicate that *Toolson* should be overturned because "baseball has become ever more commercial, and the reserve system, more restrictive" (Petition, p. 11). Yet, although a trial was ordered by the District Court in order to afford Petitioner an opportunity to produce proof as to these alleged changes (312 F. Supp. at 406), the evidence adduced at trial demonstrated that there were no changes in baseball's operations since 1953 which supported Petitioner's complaint or which indicated that baseball had abused the *Toolson* ruling.*

Indeed, the most important change in baseball's operations demonstrated at trial concerned the impact of the Players Association and the intensive collective bargaining which has taken place since the reorganization of that Association, with a full-time professional Executive Director and counsel, in 1966. Since that date, the Players Association has actively represented the players and negotiated with the baseball clubs concerning mandatory subjects of bargaining under the National Labor Relations Act. In addition, through collective bargaining, an elaborate grievance procedure has been set up for the processing of player grievances by a third party arbitrator appointed jointly by the Players Association and the clubs.

The Respondents, as well as the Players Association, concede that the reserve system is a mandatory subject of bargaining. 316 F. Supp. at 283. Accordingly, the establish-

---

* Petitioner did refer at trial to the adoption by baseball in 1965 of a free agent draft, to which he had never been subject. This draft is merely a less restrictive version of the college player drafts in effect for years in other sports. Baseball's draft grants six-month negotiating rights to the drafting club while in other sports the rights are perpetual (Tr. 472-73, 524, 582, 690). The District Court found no significance in the adoption by baseball of this draft. 309 F. Supp. 803-04.

ment of formal collective bargaining has given baseball a new and highly significant way of internally generating solutions to problems which, like the subject matter of this action, are really labor-management disputes. In fact, negotiations concerning the very issues involved in this action were in progress at the time the action was commenced (Tr. 1609-15). Far from serving as a catalyst in aid of bargaining as the Petition implies (p. 21, n. 9), this action completely stifled collective bargaining and the possibility of a harmonious resolution of these issues (Tr. 1611-15). The Players' Association and the clubs recognized the impracticability of continuing meaningful bargaining during the pendency of this action and formally agreed that bargaining on the reserve system would be suspended until this action had been finally determined. 316 F. Supp. 283-84, n. 18.

But the collective bargaining process remains the proper means for resolving this dispute. The issue here is not whether the reserve system must be abolished. Petitioner's own witnesses have conceded that baseball would be chaotic without a reserve system (e.g., Tr. 1965), and Petitioner admits that he seeks only the "modification" of the reserve system "so as to legalize it" (Petition, p. 12). But Petitioner at trial and in his briefs has never even suggested which of his proposals, if any, would "legalize" the reserve system in antitrust terms. He has stated, however, that he would be satisfied with a collectively bargained compromise (Tr. 116); and the suggestions made by Petitioner's witnesses at trial—the adoption of salary arbitration, automatic salary progression, limitations on the number of years of the reserve system's application, etc.—are plainly collective bargaining proposals to be negotiated between the club employers and player employees. The real issue is what kind of reserve system is best for the

players and clubs alike, and this is the type of issue best resolved by collective bargaining.

Petitioner attempts to avoid this conclusion by asserting that the club Respondents have never negotiated in good faith on the reserve system (Petition, p. 21, n. 9). But the District Court found otherwise after trial, stating that the history of such negotiations did not support Petitioner's assertion and that the extensive bargaining in prior years had already resulted in player benefits relating to the reserve system. 316 F. Supp. at 283.

Moreover, the District Court concluded after trial that a collectively bargained resolution was best:

> "[W]e are convinced that the conflicts between the parties are not irreconcilable and that negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned—in essence, what is called for here is continuity with change."
>
> • • • • •
>
> "[W]e believe that here, as well, the parties themselves are best able to reach a satisfactory accord, and that all avenues toward such an approach certainly have not yet been fully exhausted." 316 F. Supp. at 282, 284.

E. *The* Toolson *Ruling Has Not Been Abused By Baseball.*

Throughout the Petition there is the implication that baseball has taken advantage of the *Toolson* ruling and has used it to shield practices highly detrimental to the players. The evidence adduced at trial was quite to the contrary. The District Court's opinion best summarizes this proof:

> "Prior to trial we gained the impression that there was a view, held by many, that baseball's reserve system had occasioned rampant abuse and that it should be abolished. We were struck by the fact, however, that the testimony at trial failed to support that crit-

icism; we find no general or widespread disregard of the extremely important position the player occupies.

Clearly the preponderance of credible proof does not favor elimination of the reserve clause. . . ." 316 F. Supp. at 276.

II.

Neither The Business Of Baseball Nor Its Reserve System Are Subject To State Antitrust Regulation.

There is no tradition or history of state antitrust regulation of baseball. Despite Petitioner's arguments, baseball has consistently been viewed on a national basis.* But Petitioner, contrary to history and the judgment of Congress and the courts, including the District Court and the Court of Appeals in this action, insists that piecemeal state antitrust regulation is appropriate. Indeed, Petitioner even claims that the controlling decisions of this Court require the application of state law to baseball (Petition, p. 13). We can find nothing in the decisions of this Court—*Toolson, Shubert* and *Radovich*—or of any other court which supports this claim. To the contrary, the entire thrust of all these decisions appears to be in the opposite direction. They hold that if regulation is to occur, it is to be federal regulation as determined by Congress.

Thus Petitioner, while trying to suggest that the application of state law here is consistent with the accepted role of state law as a supplement to the federal antitrust laws, is faced with the fact that such application would flatly contradict—not supplement—federal policy. As the

* The NLRB, in asserting jurisdiction over baseball, has noted that: "It is apparent that the Employer (baseball) whose operations are so clearly national in scope ought not to have its labor relations problems subject to diverse labor relations laws." *American League and Ass'n of Umpires,* 180 NLRB No. 30, Case 1-RC-10414 (Dec. 15, 1969).

District Court observed, "enforcement of such state laws would appear to produce a result inconsistent with the objective of the federal antitrust laws interpreted by the Supreme Court as excluding the business of baseball." 316 F. Supp. at 279.

It was this inconsistency which supplied the District Court, following the decision of the Wisconsin Supreme Court in *Wisconsin v. Milwaukee Braves, Inc.*, 31 Wisc. 2d 699, 144 N.W. 2d 1, *cert. denied*, 385 U. S. 950 (1966), with one branch of its dual rationale for denying state regulation. 316 F. Supp. at 279. The Wisconsin court had held that state regulation would interfere with a Congressional policy, implicit from Congressional silence in the particular context, permitting self-regulation of baseball. 31 Wis. 2d at 730, 144 N.W. 2d at 18. In agreeing, the District Court indicated that this Court's decision in *Toolson*, which recognized and protected baseball's reliance interests, was inconsistent with the exposure of those same reliance interests to disruption by state law.

The other rationale of the *Wisconsin* case, also adopted by the District Court, was that "the national character of organized baseball and the necessary interdependence of the teams require a uniformity of regulation" and that "the regulation, if there is to be any, must be prescribed by Congress." 309 F. Supp. at 807.

Petitioner suggests that there has been no showing that state regulation would be non-uniform or burdensome (Petition, p. 16). But after considering the evidence adduced at trial, the District Court found that diverse state regulation would constitute an undue burden upon the interstate business of baseball:

> "We do not believe that the operation of baseball and its reserve system is a matter which admits of diversity of treatment. State and local laws may not unduly burden interstate commerce."

• • • • •

"As we see it, application of various and diverse state laws here would seriously interfere with league play and the operation of organized baseball." 316 F. Supp. at 280.

The Court of Appeals echoed this conclusion, while rejecting Petitioner's suggestion that uniformity could be achieved by compliance with the strictest state standard:

"Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional baseball is not to be severally fragmented. On the one hand, it is apparent that each league extends over many states, and that, if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard. The consequent extra-territorial effect of necessary compliance would be considerably more farreaching than that in *Southern Pacific Co.* v. *Arizona, supra*. On the other hand, we do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce clause precludes the application here of state antitrust law." (Footnote omitted.) 443 F.2d at 267-8.

For a concrete example of the kind of conflict and disruption inherent in state regulation, Petitioner need look no further than the *Wisconsin* litigation, where the Wisconsin trial court ordered a baseball club to return to Milwaukee, a Georgia state court ordered the same club to remain in Atlanta, and the federal district court in Houston enjoined the enforcement of the order of the Wisconsin court. Petitioner's own analysis as set forth in his brief to the Court

of Appeals in this case (pp. 43-45) provides another example. There Petitioner characterized baseball's operations as *per se* violations of the antitrust laws of some states, while noting that the rule of reason would apply in other states. Since Petitioner's witnesses generally conceded the necessity of some form of reserve system (e.g., Tr. 1965), how could the alleged *per se* doctrine fail to conflict with regulation under the rule of reason and prove utterly disruptive to baseball?

In an effort to escape this dilemma, Petitioner argues that state regulation of baseball should be permitted (presumably regardless of the consequences) lest state efforts to protect local citizens be paralyzed by the regulatory bar found by the courts below. Petitioner compares baseball's intricate web of leagues, schedules, rules and regulations to the operations of a "door-to-door seller" and implies that if the "self interest" of baseball should permit it to avoid state antitrust regulation, then the peddler may similarly be able to avoid state consumer protection laws (Petition, p. 18).

This Court provided the answer to the Petitioner's suggestion in *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), by stating that:

> "When the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight, such regulation has been generally held to be within state authority. . . .
>
> But ever since *Gibbons* v. *Ogden*, . . . the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." 325 U. S. at 767.

The courts below have followed this Court's ruling in *Southern Pacific* by balancing state interests generally (Petitioner has never asserted the interest of any particular state) against the disruption implicit in the state regulation of baseball. Baseball's obvious need for uniform nationwide regulation has been found paramount. We submit that there is no risk that state regulation of the house-to-house salesman will be jeopardized by this continued recognition of baseball's need to be free from the "application of various and diverse state laws." 316 F. Supp. at 280.

CONCLUSION

The issues raised here are long-settled questions which Petitioner seeks to overturn. They are not issues of general importance and there is no conflict among the courts with respect to them. At this Court's invitation Congress has repeatedly considered these issues and found no need for change. Moreover, the subject matter of Petitioner's claim is a mandatory subject of collective bargaining which the representatives of all interested parties are required and prepared to pursue as a part of normal labor-management negotiations.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

August 26, 1971.

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APPENDIX A

United States Constitution, Article I, Section 8

The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

United States Constitution, Article VI, clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD, *Petitioner,*

v.

BOWIE K. KUHN, ET AL., *Respondents.*

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In its brief in opposition, Organized Baseball asserts (1) that its claimed immunity from both federal and state antitrust regulation has been somehow confirmed by Congress' unwillingness to grant the antitrust exemption long sought by Baseball, (2) that Baseball must be free of every state's antitrust laws even though it is unable to show that such laws would subject Baseball to conflicting duties or impose an intolerable burden, and (3) that petitioner's antitrust claim should be left to "collective bargaining." None of these suggestions has merit.

1. Baseball argues that in the course of repeatedly declining to enact legislation exempting this one professional sport from the antitrust laws, in the face of this Court's invitation to examine the matter and intensive lobbying efforts by Baseball, Congress has

thereby conferred immunity upon it. Baseball points to Congress' failure to overrule *Toolson* and *Federal Baseball Club,* to bills favorable to Baseball which passed one House, and to committee reports which partially reflected Baseball's position. Unsuccessful bills and committee reports may, of course, be useful to illuminate the meaning of measures actually enacted into law. But there is no precedent or justification for using them as a surrogate for actual legislation. The plain fact is that for twenty years Congress has steadfastly *refused* to grant the sought after immunity. We do not infer from this that Congress thereby "intended" to subject Baseball to regulation, any more than we can accept the contrary inference urged by Baseball. Failure to legislate is simply failure to legislate. See the recent decisions of this Court on the inutility of arguments from legislative inaction, cited at p. 13 of our petition. The situation here is precisely like that involved in *Boys Markets* v. *Clerks Union,* 398 U.S. 235 (1970). In 1962, in *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962), the Court had interpreted a hotly contested provision of the Norris-LaGuardia Act—and expressly invited legislative reconsideration. 370 U.S. at 215. Congress was pressed to respond to the invitation, but did not pass the proposed legislation. In *Boys Markets* this Court declined to read one meaning or the other into this inaction, but itself reconsidered its earlier decision on the merits and overruled *Sinclair.* It should do the same to *Toolson* and *Federal Baseball Club.*

2. Baseball's argument as to state regulation is no more persuasive. Having argued to this Court in 1922 and again in 1953 that it should be granted immunity from federal regulation because it was already subject

to adequate state and local regulation, Baseball now seeks to evade the antitrust laws of every state. The interests of justice and ordinary logic require that *Toolson* and *Federal Baseball Club* should either be overruled and Baseball subjected to federal regulation,[1] or applied—and Baseball subjected to state law. Baseball should not be permitted to continue to have it both ways. In any event, Baseball has omitted even to respond to the abundantly documented contention that there is no precedent in this Court, or in reason, for wholesale displacement of every state's antitrust laws where there has been no "particularized inquiry" into the nature or impact of any of those laws, and no showing that they are in conflict or that any state law would impose an intolerable burden upon Baseball.

3. Finally, this Court should not seriously entertain Baseball's customary plea that the abuses of the reserve system, grown more restrictive since introduction of the player draft after *Toolson*, be dealt with by still another forum, this time "collective bargaining." At trial, Baseball's player relations advisor conceded that his employers have refused to this day to suggest even the slightest modification in the reserve system. (Tr. 1622-23). Indeed, rather than engage in collective bargaining on this issue, when the players' representatives recently proposed that players be freed from the restrictions of the reserve system when they reached the Social Security age of 65, Baseball refused to discuss even that modest proposal on the ground that "it would constitute a foot in the door." (Tr. 1627-29).

But even here, Baseball's sudden enthusiasm for "collective bargaining" on this issue is beside the point.

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[1] Indeed, since they do not conflict, federal and state law should both be made applicable.

This is an antitrust suit challenging a per se antitrust violation, a concerted group boycott—the kind of unlawful employer conduct which this Court has repeatedly refused to immunize from judicial scrutiny under the antitrust laws, just as the hypothetical susceptibility to collective bargaining of an unlawful employer practice does not insulate from judicial redress failure to pay a legally prescribed minimum wage, or racial discrimination in employment, or any other violation of law.

Justice requires that Baseball be put in the same position as all other professional sports—subject to the rule of law.

Respectfully submitted,

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CURTIS C. FLOOD, *Petitioner*,

v.

BOWIE K. KUHN, ET AL., *Respondents*.

BRIEF FOR PETITIONER

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions	3
Statement of the Case	4
Summary of Argument	13
Argument	15
I. Organized Baseball's reserve system is both subject to and a per se violation of federal antitrust law	15
A. The half century old decision in *Federal Baseball Club*, long moribund, should now be overruled	18
B. *Toolson* does not stand in the way	21
1. Antitrust and other professional sports	22
2. Changes in Baseball since 1953	23
3. The alleged "reliance" interest	24
4. Congressional inaction since *Toolson*	29
5. Prospective judicial relief	30
II. The court below erred in failing to apply state antitrust law to Organized Baseball's reserve system	32
III. The so-called "labor exemption" does not insulate the reserve system from antitrust scrutiny	37
Conclusion	44

TABLE OF AUTHORITIES

Page

CASES CITED:

Allen Bradley Co. v. *Local No. 3*, 325 U.S. 797 (1945) 42
American League & Ass'n of Umpires, 180 N.L.R.B. No. 30, Case 1-RC-10414 (December 15, 1969) .. 40
American Med. Ass'n v. *United States*, 317 U.S. 519 (1943) 19
American Tobacco Co. v. *United States*, 328 U.S. 781 (1946) 16
Bibb v. *Navajo Freight Lines*, 359 U.S. 520 (1959) .. 35
Blonder-Tongue Labs. v. *University Foundation*, 402 U.S. 313 (1971) 29
Boys Markets v. *Clerks Union*, 398 U.S. 235 (1970) .. 29, 31, 32
Chicago Title Ins. v. *Great Western Fin. Co.*, 70 Cal. Rptr. 849, 69 Cal. 2d 305, 444 P.2d 481 (1968) 37
Cipriano v. *Houma*, 394 U.S. 701 (1969) 31
City of Phoenix v. *Kolodziejski*, 399 U.S. 204 (1970) ..25, 31
Colorado Comm'n v. *Continental*, 372 U.S. 714 (1963) 35
Commonwealth v. *McHugh*, 326 Mass. 249, 93 N.E. 2d 751 (1950) 38
Denver Rockets v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Calif.) 7, 17, 18, 22
Fashion Originators' Guild v. *FTC*, 312 U.S. 457 (1941) 16
Federal Baseball Club v. *National League*, 259 U.S. 200 (1922) .....2, passim
Florida Avocado Growers v. *Paul*, 373 U.S. 132 (1963) 34
FTC v. *Dean Foods Co.*, 384 U.S. 597 (1966) 29
Gardella v. *Chandler*, 172 F.2d 402 (2d Cir. 1949) 4
German Alliance Ins. Co. v. *Hale*, 219 U.S. 307 (1911) 38
Giboney v. *Empire Storage Co.*, 336 U.S. 490 (1949) ..13, 37
Girouard v. *United States*, 328 U.S. 61 (1946) 29
Hart v. *B. F. Keith Vaudeville Exchange*, 262 U.S. 271 (1923) 19, 20
Haywood v. *National Basketball Ass'n*, 401 U.S. 1204 (1971) 17
Head v. *New Mexico Board of Examiners*, 374 U.S. 424 (1963) 37
Helvering v. *Hallock*, 309 U.S. 106 (1940) 29
Hooper v. *California*, 155 U.S. 648 (1895) 19

Page

Huron Portland Cement Co. v. *City of Detroit*, 362 U.S. 440 (1960) 34
International Harvester Co. v. *Missouri*, 234 U.S. 199 (1934) 38
Klor's, Inc. v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) 16
Lear, Inc. v. *Adkins*, 395 U.S. 653 (1969) 26
Mandeville Island Farms, Inc. v. *Crystal Sugar Co.*, 334 U.S. 219 (1948) 16, 19
Martin v. *National Baseball Club*, 174 P.2d 917 (2d Cir. 1949) 4
Meat Cutters v. *Jewel Tea*, 381 U.S. 676 (1965) 40, 41
Moragne v. *States Marine Lines*, 398 U.S. 375 (1970) 2, 21, 29
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) 34, 35
Puerto Rico v. *Shell Co.*, 302 U.S. 253 (1937) 37
Radovich v. *National Football League*, 352 U.S. 445 (1957) 7, 12, 20, 22, 42
Ramsey v. *Mine Workers*, 401 U.S. 302 (1971) 40, 41
Salerno v. *American League*, 429 F.2d 1003 (2d Cir. 1970), cert denied sub nom. *Salerno* v. *Kuhn*, 400 U.S. 1001 (1971) 20
Simpson v. *Union Oil Co.*, 377 U.S. 13 (1964), and 396 U.S. 13 (1969) 31
Sinclair Ref. Co. v. *Atkinson*, 370 U.S. 195 (1962) 32
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) 36
The Harrisburg, 119 U.S. 199 (1886) 21
Tigner v. *Texas*, 310 U.S. 141 (1940) 37
Toolson v. *New York Yankees*, 346 U.S. 356 (1953) 2, *passim*
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 40, 41
United States v. *Estate of Donnelly*, 397 U.S. 286 (1970) 31
United States v. *E. C. Knight Co.*, 156 U.S. 1 (1895) 26
United States v. *General Motors Corp.*, 384 U.S. 127, 145-147 (1966) 16
United States v. *Hutcheson*, 312 U.S. 219 (1941) 40
United States v. *International Boxing Club*, 348 U.S. 236, 240-241 (1955) 19, 22
United States v. *Shubert*, 348 U.S. 222 (1955) 20

Page

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 16
United States v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) 19
United States v. *Women's Sportswear Mfr's Ass'n*, 336 U.S. 460 (1949) 42
Wickard v. *Filburn*, 317 U.S. 111 (1942) 26
Wisconsin v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1, cert. denied, 385 U.S. 990 (1966) ..34, 39

CONSTITUTIONAL AND STATUTORY PROVISIONS:

U.S. Const., Art. I, Sec. 8 .....3, 47
U.S. Const., Amend. XIII 3, 6, 47
15 U.S.C. § 1 .....3, 47
15 U.S.C. § 3 50
15 U.S.C. § 1291 30
18 U.S.C. § 1581 .....2, 6, 47
28 U.S.C. § 1254(1) 2
29 U.S.C. §§ 102 and 103 .....3-4, 6, 48, 49
42 U.S.C. § 1994 .....2, 6, 48
Calif. Bus. & Prof. Code §§ 16600, 16720, 16726 50
2 Ga. Stat. Ann. § 2701 51
20 Ga. Code Ann. § 504 51
38 Ill. Ann. Stat. §§ 60-3, 60-11 .....37, 51, 52
50 Kan. Stat. Ann. §§ 101, 102, 107 52
Md. Const. Decl. of Rights, Art. 41 53
93 Mass. Gen. Laws Ann. §§ 2, 19 53
Mich. Corp. Laws Ann. §§ 445.761, 762 54
Minn. Stat. Ann. §§ 325.8014-8015 54
Mo. Ann. Stat. §§ 416.010, 416.030, 416.040 .....55, 56
N.Y. Gen. Bus. Laws § 340 56

Page

Ohio Rev. Code Ann. § 1331.01 57

Tex. Code Ann. § 15.02-04 57

Wash. Rev. Code Ann. § 19.86.030 58

Wis. Stat. Ann. § 133.01 58

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H.R. Rep. No. 2002, 82d Cong., 2d Sess. (1956), p. 231 .. 39

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Statement of Lawrence Fleisher for National Basketball Players Ass'n, Before Sen. Subcomm. on Antitrust and Monopoly, on S. 2373, 92 Cong., 1st Sess. (Nov. 1971) 28

Letter from Chairman, NBA Negotiating Comm. to Lawrence Fleisher, dated Sept. 2, 1971, submitted to Sen. Subcomm. on Antitrust and Monopoly, 92d Cong., 1st Sess. (Nov. 1971) 28

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Durso, "The All-American Dollar: The Big Business of Sports" (1971) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD, *Petitioner,*

v.

BOWIE K. KUHN, ET AL., *Respondents.*

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 443 F.2d 264. [A. 125] * The opinions of the District Court for the Southern District of New York (Cooper, J.) (R. 48A, 108A, 127A) are reported at 309 F. Supp. 793, 312 F. Supp. 404 and 316 F. Supp. 271. [A. 54, 83, 95]

* The bracketed references are to the separate single appendix filed in this Court. The references in parentheses are to the joint appendix used in the Court of Appeals.

JURISDICTION

The Court of Appeals entered judgment on April 7, 1971. [A. 141] A timely petition for certiorari was filed on July 6, 1971. Certiorari was granted on October 19, 1971. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Finding itself in "a most frustrating predicament," and blaming the "vagaries of fate," the Court of Appeals confessed it was helpless to decide this case properly. Accordingly, it declined to determine the lawfulness of Organized Baseball's "reserve system" under either federal antitrust law or state statutory or common law. On the one hand, the court regarded itself as "compelled" to follow *Federal Baseball Club* v. *National League,* 259 U.S. 200 (1922) and *Toolson* v. *New York Yankees,* 346 U.S. 356 (1953)—the concededly anomalous decisions of this Court which held that Organized Baseball is not "interstate commerce." On the other hand, the court rejected petitioner's state law claims for precisely the opposite reason—that Baseball *is* "interstate commerce" and somehow entitled to immunity from state regulation.

The questions presented are:

(1) Should not this Court, in the exercise of its supervisory power, rectify this bizarre result and thus preserve "public faith in the judiciary as a source of impersonal and reasoned judgments," *Moragne* v. *States Marine Lines,* 398 U.S. 375, 403 (1970)?

(2) Have not subsequent decisions of this Court, and developments in professional sports, so undermined *Federal Baseball Club* and *Toolson* that they may no

longer shield Organized Baseball's reserve system from the federal antitrust laws?

(3) Even assuming *Federal Baseball Club* and *Toolson* are to stand, may Organized Baseball be insulated from all state antitrust regulation, thus creating a unique "no-man's land"?

(4) May the federal courts curtail the reach of all state antitrust statutes on a wholesale basis, without conducting any "particularized inquiry" into the nature of the statutes or their impact upon interstate commerce, and with no finding that they violate any federal constitutional provision, or conflict with any federal statute or with one another, or intrude into an area which Congress has affirmatively found should be free of state antitrust regulation, or discriminate against interstate commerce?

(5) May Organized Baseball continue successfully to maintain:

(a) to the courts: that only Congress can correct the abuses of Baseball's reserve system;

(b) to the Congress: that the courts are adequate and legislation unnecessary;

(c) to proponents of federal regulation: that state regulation suffices; and

(d) to proponents of state regulation: that federal regulation alone may be applied?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The texts of the Commerce Clause of the Federal Constitution and the Thirteenth Amendment thereto, and the texts of Section 1 of the Sherman Act, 15 U.S.C. § 1, 42 U.S.C. § 1994, 18 U.S.C. § 1581, 29 U.S.C.

§§ 102 and 103, and the applicable state statutes are set forth in the statutory appendix to this brief, Appendix A.

STATEMENT OF THE CASE

1. The Complaint

Petitioner Curtis C. Flood [hereinafter Flood] brought this action in the United States District Court for the Southern District of New York to challenge the legality, under federal antitrust and state statutory and common law, of Organized Baseball's "reserve system." This is the scheme which binds every American professional baseball player to one team, or its assignee, for life, and which compels team owners, whether competitors or not, to boycott the player property of another team owner—and to boycott any fellow owner who fails to abide by the agreement among the owners to eliminate competition in the recruitment and retention of personnel.[1]

Flood's suit arose out of the October 1969 "trade" by which the St. Louis Cardinals—for whom he had

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[1] The reach of the reserve system in fact extends far beyond national, continental and even hemispheric lines. Marvin Miller, Executive Director of the Major League Baseball Players Association, testified below that an American player black-listed by Organized Baseball today finds himself boycotted by Japanese employers as well. (R. 163-64) [A. 166] As long ago as the 1940s, Organized Baseball manifested the extra-national force of its system, blacklisting players for five years who had "jumped" to Mexico to earn a better living at their trade. See *Gardella v. Chandler*, 172 F.2d 402 (2d Cir. 1949); *Martin v. National League Baseball Club*, 174 F.2d 917 (2d Cir. 1949) (L. Hand, J.). The Washington Post, on December 11, 1971, reported that former major league third baseman Clete Boyer had been traded by the Hawaii Islanders to the Taiyo Whales of the Japanese Central League, assertedly the first such "inter-hemispheric" trade.

played for twelve years as a star centerfielder and frequent .300 hitter (R. 35-36) [A. 144] —traded him in a multi-player transaction to the Philadelphia Phillies. Despite his long service, his position as Cardinal co-captain (R. 40) [A. 146], his stature as reflected in his $90,000 salary (R. 38) [A. 145], and his deep business and personal roots in St. Louis (R. 51-53) [A. 150-51], he had not been consulted about the trade. His "owner" told him about it only after the fact. Notice consisted of a telephone call and a printed form "Notice to Player of Release or Transfer." Those portions of the form which did not apply to him were crossed out. (Pl. Ex. 1, R. 27A, 48-50) [A. 35-36] Flood's right to any voice in the matter had presumably been irrevocably forfeited fourteen years earlier when, at the age of 18 and without the assistance of an attorney or any other advisor, he signed his first professional baseball contract for an annual salary of $4000. (R. 13-15) [A. 143]

On December 24, 1969, Flood wrote to the Commissioner of Baseball, Respondent Kuhn, asserting his right to negotiate with teams other than Philadelphia, and stating

> "After twelve years in the Major Leagues, I do not feel that I am a piece of property to be bought and sold irrespective of my wishes. I believe that any system which produces that result violates my basic rights as a citizen and is inconsistent with the laws of the United States and of the several states." (Pl. Ex. 4, R. 29A, 71-72) [A. 37]

Kuhn replied that while he agreed with the contention "that as a human being you are not a piece of property to be bought and sold" and that this "is fundamental in our society," he could not "see its applic-

ability to the situation at hand." (Pl. Ex. 5, R. 30A, 73-74) [A. 38-39]

Flood filed suit only after the Commissioner of Baseball thus denied his request that he be made a "free agent," at liberty to seek employment with other teams, and without subjecting a new employer to boycott by the team owners. His attack focused on Organized Baseball's interrelated set of rules and agreements which purported to require him—at age 32—to acquiesce in his involuntary sale to Philadelphia or abandon his highly successful career.

The complaint (R. 6A) [A. 6] was filed in federal district court on January 16, 1970 against the twenty-four major league teams comprising both major leagues, the presidents of the two leagues, and the Commissioner of Baseball. Count I charged that defendants violated the federal antitrust laws by their reserve system and their insistence that Flood play baseball in Philadelphia or nowhere, and that no other team owner negotiate with him without Philadelphia's permission. Count II, based on diversity of citizenship and naming eleven defendants, asserted that the reserve system and defendants' boycott violated the antitrust laws of New York, California and other states, as well as civil rights statutes. Count III, which named thirteen defendants, asserted that the reserve system and the boycott violated the common law. Count IV charged thirteen of the defendants with imposing upon Flood a form of peonage and involuntary servitude proscribed by 42 U.S.C. § 1994, 18 U.S.C. § 1581, and the Thirteenth Amendment to the United States Constitution, as well as depriving him of his "freedom of labor" in violation of 29 U.S.C. §§ 102 and 103.

Flood sought a declaration that the reserve system is unlawful, an injunction against the boycott, and triple the monetary damages he has sustained since December 30, 1969.

Despite the offer of a lucrative salary and his awareness of the damage a long layoff would wreak on his playing ability at this stage of his career,[2] Flood out of principle declined to play for Philadelphia, and accordingly missed the entire 1970 season.

Flood adhered to his refusal to play for Philadelphia during the protracted litigation below. But when Philadelphia sold its exclusive right to negotiate with Flood to the Washington Senators after the 1970 season concluded, financial necessity compelled him to acquiesce. By agreement among the parties to this litigation, Flood's decision to accept Washington's terms for the 1971 season was without prejudice to this case. Events showed, however, that the year's forced layoff had eroded his skills. He left the team early in the 1971 season and is not now playing in Baseball.[3]

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[2] See *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1057 (C.D. Calif. 1971) (finding of irreparable harm where boycott imposed layoff even on a young ballplayer).

[3] Agreement among the parties is not, of course, conclusive on mootness. But these events clearly do not moot this case, in which Flood seeks treble monetary damages. The success of a boycott, after all, cannot insulate it from judicial scrutiny. See *Radovich* v. *National Football League*, 352 U.S. 445 (1957), where the complainant was granted judicial relief from professional football's reserve system after a boycott had ended his career. Like Radovich, Flood has been damaged by the group boycott complained of, having lost his total salary for 1970 of over $100,000 and suffered impairment of his career. He, too, is entitled to dissolution (or domestication) of the reserve system and to appropriate compensation.

2. In the District Court

Flood promptly sought to restrain, during the pendency of the litigation, the boycott which prohibited teams other than Philadelphia from negotiating with him. On March 4, 1970, District Judge Irving Ben Cooper denied this preliminary relief. 309 F. Supp. 793. (R. 48A) [A. 54] However, on April 23, 1970, he also declined to grant defendants' motions for summary judgment on Flood's principal claims, holding that a full trial was essential for their adjudication. 312 F. Supp. 404. (R. 108A) [A. 83]

The case was tried over a three-week period to Judge Cooper, sitting without a jury. The reserve system was demonstrated to be a closely interrelated set of agreements and provisions—many of which do not themselves appear in the Uniform Player's Contract[4]—which uniquely restrict both player and team owner freedom. For example, Major League Rule 3(a)[5] requires every player to sign a standard form contract, and forbids any team from offering a non-uniform contract without the Commissioner's consent. The record shows that the Commissioner of Baseball has *never* permitted deviation from the imposed terms of that contract. (R. 153) [A. 160] Section 10(a) of the

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[4] A copy of the contract was appended to the complaint and appears at R. 23A-26A. [A. 19-35]

[5] The Rules were Pl. Ex. 6. [See Blue Book] Rule 3(a) is described at 316 F.Supp. at 274 n. 4. (R. 136A) [A. 99] Note that although this discussion is couched in terms of the "Major League Rules," a parallel set of provisions—the "Professional Baseball Rules"—eliminates competition in the recruitment and retention of the vast majority of minor league players who are not under major league contract. They suffer the same restrictions on their freedom to seek and obtain employment as do their major league brethren, and at markedly lower salaries.

Contract provides that if a player does not sign with the club which had his last contract by March 1, the team owner may *unilaterally* renew his contract and cut his salary. (R. 25A) [A. 29-30] Each renewed contract contains the same renewal provision. 316 F. Supp. at 274 n. 4. (R. 136A) [A. 99] Section 6(a) and Rule 9 authorize a team owner to assign a player's contract to any other owner, without consultation with the player and without his consent. 316 F. Supp. at 274 n. 7. (R. 24A, 139A) [A. 101] Any player or team owner who violates any part of this intricate system of rules may be boycotted by all other team owners. (R. 162-163) [A. 165-66] A team owner and player cannot even agree between themselves to allow the player to become a free agent, for Rule 8 requires that all other major league teams must be given an opportunity to purchase his contract. 316 F. Supp. at 275 n. 11. (R. 140A) [A. 101] Thus, the contract in toto, and the related rules and agreements, bind the player to the team that "owns" him, or its assignee, in perpetuity.

In 1965, the reserve system was extended for the first time to potential new players who have never signed an agreement with any team. Typically, these are teen-agers just graduated from high school, or who have dropped out of high school for one year. A semi-annual draft was devised wherein a drafted potential new player may only bargain with that team owner who chose him in the involuntary draft. (R. 145-149, 251-254) [A. 155-58, 187-88] No longer is it possible for a young man wanting to play professional baseball to select even his *first* employer.

The District Court found that Baseball's reserve system "is not presently collectively agreed to." 309 F. Supp. at 806 n. 51. (R. 89A) [A. 75] It was

not part of the Basic Agreement negotiated in 1968 between the team owners and the Major League Baseball Players Association,[6] which agreement provides only for "review" of the issue and expressly exempts it from bargaining during the life of the agreement. *Ibid.* No collective bargaining agreement of any kind exists between minor league players, who are totally unorganized, and their owners. In both major and minor leagues, each player's contract negotiation has always been an individual matter between himself and the team owner. The Players Association does *not* negotiate contracts for any player. In fact, it has been Baseball's historic position that players may not be accompanied in contract negotiations by any attorney, representative, or translator—even when, as is now often the case, the player is a Latin American who speaks little or no English. (R. 278, 1037) [A. 192-93, 289]

The reserve system and its implications were explored in the crucible of a three-week trial, "the first time in almost fifty years [that] opponents and proponents of the baseball reserve system have had to make their case on the merits and support it with proof in a court of law." 316 F. Supp. at 284. (R. 172A) [A. 120] Former ball players, former team owners, executives from other sports, the executive director of the Major League Baseball Players Association, and a distinguished economist testified on behalf of petitioner. With one exception, the witnesses for respondents were the respondents themselves or their employees.

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[6] The Association, organized in 1966 on a full-time basis, represents only the 600 or so major league players in dealing collectively with the major league owners and the Commissioner. (R. 140) [A. 154-55]

Flood pressed the court to declare the reserve system a *per se* violation of federal antitrust law; and contrary to state law. In the event the court declined to apply the *per se* rule, he adduced evidence to show that the reserve system was unreasonably restrictive and that much less restrictive alternatives were available.[7] The trial court ultimately declined to decide the issues on their merits. It held that it was foreclosed from doing so by decisions of this Court which allegedly put Organized Baseball's reserve system beyond the reach of both federal and state law. 316 F. Supp. 271. (R. 127A) [A. 120-21]

3. The Appeal

On April 7, 1971, the Court of Appeals for the Second Circuit concluded that it was "compelled to affirm," but confessed its inability properly to dispose of the case on its real merits. 443 F. 2d 264. [A. 126]

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[7] These alternatives, as listed by the trial court, 316 F.Supp. at 275 n. 12, (R. 140A) [A. 102] were:

> "Modifications of and alternatives to the present reserve system suggested by plaintiff include: (a) independent competitive leagues; (b) limitation of club control over a player to a fixed term of years; (c) permitting a player to become a free agent after an option period; (d) trade veto for veteran players; (e) minimum salary progression; (f) reduction in the number of reserved players; (g) salary arbitration. Consideration was given them both individually and in combination. Various refinements were advanced to meet certain objections raised as to proposals (b) and (c), including a right of first refusal given to the player's club to match any offer obtained by the player, a restriction of negotiations to only clubs in the other league and then only in the off-season, and/or a more equalized division of baseball revenues among clubs. See Tr. 221-22, 235, 237-38, 247, 255-58, 1966-67, 1981-84, 1985-86, 2020-23."

Through Judge Waterman, the court thus summarized the "predicament" in which Flood was placed:

> "On the one hand, the doctrine of stare decisis binds the plaintiff because of an initial holding that baseball is not 'interstate commerce' within the Sherman Act, and, on the other hand, after there have been significant changes in the definition of 'interstate commerce,' he is now told that baseball is so uniquely interstate commerce that state regulation cannot apply." 443 F. 2d at 268. [A. 131]

The court held that, as a lower court, it was obliged to follow this Court's ruling of a half century ago, in *Federal Baseball Club* v. *National League,* 259 U.S. 200 (1922), that Organized Baseball is not subject to the Sherman Act because its "exhibitions," involving "personal efforts, not related to production," were local affairs and not "trade or commerce." The court conceded that *Federal Baseball Club* and *Toolson* v. *New York Yankees,* 346 U.S. 356 (1953), which declined to overrule it, were "seemingly inconsistent" with the Court's later decision in *Radovich* v. *National Football League,* 352 U.S. 445 (1957), that professional football's similar, but less onerous, reserve system was subject to the Federal antitrust laws. 443 F. 2d at 266. [A. 127] Nonetheless, it concluded it was not itself free to set aside *Federal Baseball Club* and *Toolson.* Relief, it said, must come from this Court. 443 F. 2d at 268. [A. 128]

As to petitioner's state law claims, the Court of Appeals impaled Flood on the second horn of a dilemma which, Judge Waterman confessed, put him "in a most frustrating predicament." 443 F. 2d at 268. [A. 131] Although Baseball was held not

"interstate commerce" for federal purposes, the court held that, for purposes of state law, Baseball not only is "interstate commerce," but is so "uniquely interstate" as to preclude state regulation. It conceded that state antitrust regulation is ordinarily not preempted by federal antitrust law. *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 495 (1949). But it ruled that the states' interest in antitrust regulation must be subordinated to Baseball's asserted need to be free from compliance with the "strictest state antitrust standard," whatever that might be. *Ibid.*

The court admitted the incongruity of thus giving Flood the worst of both worlds. But it disclaimed responsibility:

> "Any apparent inconsistency results not from faulty logic, but from the vagaries of fate and this court's subordinate role to the Supreme Court." *Ibid.* [A. 132]

SUMMARY OF ARGUMENT

This Court is not compelled by considerations of its place in the federal judicial system to acquiesce in such an embarrassingly unsatisfactory result. The time has come for the 1922 decision in *Federal Baseball Club* that Organized Baseball was not "interstate commerce," a decision long conceded to be an anachronism, to be explicitly overruled and for Organized Baseball's present reserve system with its new involuntary draft to be subjected to federal antitrust law as are professional football, basketball, hockey and other professional sports. *Toolson* does not stand in the way of such an overruling. Decisions of this Court subsequent to *Toolson* and developments both in other professional sports and in Organized Baseball itself demonstrate that the considerations which led this

Court in 1953 to decline to overrule *Federal Baseball Club* no longer apply.

Second, and wholly apart from the fate of *Federal Baseball Club* and *Toolson,* this Court should make clear that state antitrust laws *do* apply to the practices in question. It was only in the context of forceful representations by Organized Baseball to the effect that state and local regulation of the reserve clause would suffice to remedy abuses that this Court decided both *Federal Baseball Club* and *Toolson.* The court below not only failed to give appropriate weight to this circumstance, but erroneously preempted the entire body of all state antitrust law without examining the law of any single jurisdiction, without the required "particularized inquiry" into the impact of any state law upon interstate commerce, and with no mandate from Congress to preempt. In so doing, the court below seriously departed from the judicial technique mandated by this Court for assessing state regulatory schemes against the Interstate Commerce Clause of the Federal Constitution.

Finally, Baseball should not be allowed once again to attain immunity from the rule of law by arguing that the gross abuses which characterize its reserve system must be dealt with, not by the forum at hand, but by "still another forum." To this Court, Baseball argued in 1921 and 1953 that it was to states and local governments that complainants must look for redress. To Congress, Baseball has argued that the courts or state legislatures were the appropriate bodies to remedy the defects. And in both state and federal court, Baseball has argued that it is legislative, and not judicial, redress that is appropriate. Having exhausted all such avenues of evasion, Baseball now seizes upon a new one. Baseball now argues that the

problem is one neither for the courts nor the legislatures, but rather for the collective bargaining table and the National Labor Relations Board. This position wholly misconceives the relationship between the national labor relations laws and federal and state antitrust law. We have here a concerted agreement among business enterprises to eliminate all competition in the recruitment and retention of personnel, an agreement enforced by a nation-wide, and indeed world-wide, boycott of any player or member enterprise who fails to observe the agreement. Such agreements among businessmen are not insulated from the antitrust laws simply because the competition which they seek to eliminate involves recruitment and retention of personnel. This is particularly true in an industry like Baseball where playing careers are exceedingly short—and hence collective bargaining power is weak, where only a small portion of the players are organized and participate in any kind of collective bargaining, where the agreement in question was not collectively agreed to even by the minority of organized players, where discretionary power to transfer or bench a player is unfettered, and where the blacklist used to enforce the scheme is industry-wide in its scope.

ARGUMENT

I. ORGANIZED BASEBALL'S RESERVE SYSTEM IS BOTH SUBJECT TO AND A PER SE VIOLATION OF FEDERAL ANTITRUST LAW.

It is beyond dispute that Organized Baseball today is a business, big business. Its owners are businessmen—or, in some cases, giant corporations selling everything from beer to television time.[8] As one of

[8] See generally Durso, "The All-American Dollar: The Big Business of Sports" (1971).

Baseball's own witnesses expressed it at trial, "Skill is the *commodity* that you are dealing with in baseball." (Emphasis supplied.) (R. 1297) [A. 299]

The Sherman Act has long prohibited businessmen from entering into concerted agreements to eliminate competition among themselves in the procurement of commodities essential to their businesses. *Mandeville Island Farms, Inc.* v. *Crystal Sugar Co.*, 334 U.S. 219, 241-242 (1948) (agreement among all sugar beet refiners to offer only a uniform contract to all local growers of sugar beets); *American Tobacco Co.* v. *United States*, 328 U.S. 781 (1946); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). And businessmen are plainly prohibited by the Act from utilizing concerted refusals to deal, or group boycotts. *United States* v. *General Motors Corp.*, 384 U.S. 127, 145-147 (1966); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) (boycott of a single trader unlawful); *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457 (1941).

There is little question but that Organized Baseball's reserve system falls squarely within these *per se* proscriptions. Before the *Toolson* decision, Judge Frank so concluded in *Gardella* v. *Chandler*, 172 F.2d 402, 408-415 (2d Cir. 1949) (separate opinion), noting that before *Federal Baseball Club* both federal and state courts had repeatedly refused to enforce Baseball's reserve clause on the ground of its invalidity. And his brother, Judge Learned Hand, added that "one of the oldest and best established" of the restraints of trade forbidden even by the common law "is a contract which unreasonably forbids anyone to practice his calling." 172 F.2d at 408. More recently, professional basketball's rules seeking to "regulate" compe-

tition in the recruitment of personnel were preliminarily enjoined on federal antitrust grounds, and partial summary judgment has been entered against basketball. *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049 (C.D. Calif. 1971). See *Haywood* v. *National Basketball Ass'n*, 401 U.S. 1204 (1971) (Douglas, J.).

Respondents have suggested that petitioner is somehow inconsistent in contending that the present reserve system involves *per se* violations of the federal antitrust laws, while conceding that he does not seek the total eradication of all measures to assure some degree of player continuity and team balance. This is no contradiction, for petitioner has argued alternatively that the reserve system and its boycott are unlawful, whether a *per se* rule or the "rule of reason" is applied. It is his principal contention that, to the extent Organized Baseball's reserve system eliminates all competition in the recruitment and retention of personnel, and achieves enforcement by resort to concerted refusals to deal or group boycott, *per se* violations are involved. He has no obligation to demonstrate how Baseball should be run. It has never been the office of an antitrust plaintiff to do more than show the illegality of the challenged practice and the injury to himself. He need not reorganize defendant's business for him, or procure a declaratory judgment that the suggested reorganization complies with the law. If he prevails and the practice is struck down, there will be time enough to eliminate what has been found to be unlawful, and to bring Baseball into compliance with the law.

Flood has, however, demonstrated that there are a wide range of less onerous alternatives available to Baseball. These alternatives, which include permit-

ting a player to play out a short option period as is now done in football and basketball, allowing compensation to the team which loses a player to another as professional basketball now arguably proposes, requiring some period during which a player cannot become a free agent, or some combination of these or other alternatives, were before the trial court. They are relevant to whatever relief is fashioned, and to decision on illegality should the *per se* rule not be held applicable.[9]

Experienced baseball men—Bill Veeck, who ran three major league teams and two minor league teams over 35 years, and Hank Greenberg, both star player and respected team executive—testified to the feasibility of these and other proposals and to their readiness to invest in Baseball after the present reserve system is eliminated. (R. 1961-86, 238-241) [A. 384-397, 180-181]

One thing does emerge with clarity. The present arrangement, the most restrictive in the world of professional sports, is unlawful, and Organized Baseball must follow other sports in devising less onerous restrictions upon the competition for player personnel. Compare *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. at 1062-1067.

A. The Half-Century-Old Decision in Federal Baseball Club, Long Moribund, Should Now Be Overruled.

In 1922, in a private antitrust suit brought by a professional baseball team which had sought to recruit players in competition with the then established major

[9] Petitioner has had no occasion to measure any of these alternatives against the antitrust laws, and he offers no opinion on them—except to observe that their adoption would ameliorate the harshness of Baseball's reserve system.

leagues, this Court held that it need not reach the validity under federal antitrust law of Organized Baseball's reserve system as it then existed because "exhibitions of baseball" were "purely state affairs," and were not interstate "trade or commerce" within the meaning of the Sherman Act. *Federal Baseball Club* v. *National League,* 259 U.S. 200, 208-209 (1922). Mr. Justice Holmes, writing for the Court, made no analysis of the reserve clause or of the antitrust laws, but simply relied upon then current doctrine which declared "personal efforts, not related to production" not to be "a subject of commerce," and which disregarded "interstate" aspects of multistate business when they related only to "transportation."

Although the unfortunate consequences of that short three-page opinion are still with us, its precedential underpinnings have long since disappeared. Indeed, in the very next term, the Court refused to apply *Federal Baseball Club,* reversing a lower court decision applying it to the theatrical business. *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U.S. 271 (1923) (Holmes, J.). Within a few years, this Court discarded the several concepts relied upon in 1922. *Hooper* v. *California,* 155 U.S. 648 (1895), which Holmes had cited, and its narrow view of "trade or commerce," did not survive *Mandeville Island Farms* v. *Crystal Sugar Co.,* 334 U.S. 219 (1948), and *United States* v. *South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944). And the doctrine, regarded as controlling in 1922, that personal services are not "trade or commerce" within the meaning of the Act, was conclusively rejected in *American Medical Assoc.* v. *United States,* 317 U.S. 519 (1943).

Indeed, this Court has already remarked the precedential demise of *Federal Baseball Club.* The opinion

for the Court in *Radovich* v. *National Football League,* 352 U.S. 445, 450 (1957), not only declined to apply *Federal Baseball Club* to a nearly identical arrangement in professional football, but expressly noted that it "at best was of dubious validity." In *United States* v. *Shubert,* 348 U.S. 222, 226-228 (1955) and in *United States* v. *International Boxing Club,* 348 U.S. 236, 240-241 (1955), this Court recounted the broadening of the interpretation of the Sherman Act's phrase, "trade or commerce," since 1922. It noted Holmes' rethinking as reflected in *Hart* v. *B. F. Keith Vaudeville Exchange,* supra. 348 U.S. at 228-229. And it refused to apply *Federal Baseball Club's* interpretation of the Sherman Act's "trade or commerce" language to boxing or the theatre.

Judge Friendly spoke the universal consensus when he wrote that

> "We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical'. . . ."

Salerno v. *American League,* 429 F.2d 1003, 1005 (2d Cir. 1970) cert. denied, sub nom. *Salerno* v. *Kuhn,* 400 U.S. 1001 (1971).

In these circumstances, no genuine issue of *stare decisis* would be raised by a frank declaration that *Federal Baseball Club* has long ceased to be an appropriate interpretation of the "trade or commerce" language of the Sherman Act. This Court has already said as much.

Where, as here, a decision "rested on a most dubious foundation when announced [and has] become an increasingly unjustifiable anomaly as the law over the years has left it behind," this Court has frankly and without qualm overruled it. *Moragne* v. *States Marine Lines,* 398 U.S. 375, 404 (1970) (Harlan, J.), overruling *The Harrisburg,* 119 U.S. 199 (1886). *Federal Baseball Club,* too, was "somewhat dubious even when rendered" and "is such an unjustifiable anomaly in the present [antitrust] law that it should no longer be followed." 398 U.S. at 378. Here, too, a "development of major significance has intervened"—"the wholesale abandonment of the rule in most of the areas where it once held sway. . . ." 398 U.S. at 388. And, as the opinions below indicate, its continued formal authority compels lower courts to decide cases in ways which they cannot justify in their opinions and which embarrass the entire judicial process. "Respect for the process of adjudication should be enhanced, not diminished . . ." by overruling this anomaly. 398 U.S. at 405.

B. Toolson Does Not Stand in the Way.

In 1953, the Court announced a one-paragraph, unsigned opinion in *Toolson* v. *New York Yankees,* 346 U.S., 356 (1953), declining to overrule *Federal Baseball Club.* That decision does not preclude this Court, nearly two decades later, from now doing so. *Toolson,* after all, expressly omitted any "re-examination of the underlying issues." 346 U.S. at 357. Contrary to this Court's present jurisprudence, it attached great weight to congressional inaction in the face of the 1922 decision. Without a factual record, it conjectured that investors may have "relied" on Baseball's post-1922 immunity from the Sherman Act. And its conclusion

that complainants must seek their federal remedy in the Congress, where relief might be "prospective" and not from this Court, rested on the no longer valid assumption that a judicial remedy under the antitrust laws could only be "retrospective." *Ibid.*

Subsequent events have totally undermined *Toolson's* continued vitality, rendering it as pregnable as *Federal Baseball Club* itself.

1. Antitrust and Other Professional Sports.

Decisions relating to other professional sports have intervened since *Toolson* to discredit it just as *Federal Baseball Club* was discredited by later decisions repudiating its narrow view of the Sherman Act's jurisdictional language. Four years after *Toolson* was decided, this Court held the antitrust laws applicable to other professional sports and their arrangements for eliminating competition in the recruitment and retention of personnel. *Radovich* v. *National Football League,* supra. See also *United States* v. *International Boxing Club,* supra. The lower courts have followed the lead, applying the federal antitrust laws to invalidate arrangements whereby team owners restrict one another in competing for new players. *Denver Rockets* v. *All-Pro Management, Inc.,* supra. In dealing with other sports and similar enterprises, this Court has expressly recognized that there is no logical distinction between them and Baseball. *Radovich* v. *National Football League,* 352 U.S. at 452. The continued survival of such an anomaly embarrasses the judicial process.

2. Changes in Baseball Since 1953.

Whatever justification there was for regarding Baseball as a "sport" deeply rooted in the loyalties of particular groups of fans ceased to exist after 1953. The major leagues have grown from sixteen to twenty-four teams, (R. 689.) [A. 248] expanding to every city which seems able to pay the freight, and abandoning communities with long baseball histories. When Baseball's market forecast proves erroneous or is rendered irrelevant—as in Washington—by underfinancing of the venture, overpricing of tickets, or other economic considerations, the offending team is moved—by agreement of all the league's team owners—from one community to another. Thus Brooklyn and Washington vanish from Baseball, while Anaheim, California, and Arlington, Texas, obtain franchises.

There have been other, perhaps more important, changes. The reserve system itself has been made drastically more restrictive since it was before the Court in 1953. It was possible in 1953, as in 1922, for a talented young man to select his first employer from among those teams interested in bidding for his services; it was only after the signing of his first contract that he became enmeshed in the reserve system. But in 1965 this one remaining player freedom was eradicated. The institution of the semi-annual draft meant that a drafted player could negotiate only with the team which drafted him. All other teams are forbidden—by threat of boycott—from approaching him. *Toolson* declined to reconsider the validity of the old reserve system. But this Court has never been called upon to make that decision with respect to the present reserve system, with its involuntary draft of players. By its own hand, Baseball has substantially diminished whatever precedential value *Toolson* had.

3. The Alleged "Reliance" Interest.

Developments both doctrinal and otherwise have also put to rest the so-called "reliance interest" which the Court stressed in 1953.

First, what is the nature of the "reliance interest" here asserted? Upon what have Baseball investors actually "relied" since 1953? Or since 1922? *Federal Baseball Club* did not entitle any businessman to assume that, because his business involved personal services unrelated to production, he need not worry, even a half-century later, about engaging in anti-competitive practices. The likelihood of judicial or legislative correction became apparent as early as the next Term. And in fact this Court has not hesitated to apply the antitrust laws with full force to businessmen—including owners of professional sports teams—who had as much reason as baseball team owners to "rely" on *Federal Baseball Club* and *Toolson*.

Toolson itself gave little in the way of additional assurance. All that it said was that the Court would not then, in 1953, reconsider *Federal Baseball Club*. Moreover, it expressly invited legislative correction. Anyone interested in investing in a baseball team has known since *Toolson* that Congress might at any time enact legislation which would substantially change the relationship between Baseball and the antitrust laws. Indeed, post-*Toolson* purchasers of baseball teams testified below that they were advised change might come from Congress, but found assurance in the fact that change would not be "retroactive" and they would get a chance to state their case—benefits fully available in this very proceeding. (R. 1241-1244, 1313, 1360) [A.

292-94, 302, 304] [10] The investor knew also that the prospects for passage of such legislation fluctuate in response to external events. Thus when the owners consented to allow a large corporation controlling one of the three national broadcasting networks, to purchase the New York Yankees, it was widely believed by baseball men that this would jeopardize their industry's status under the antitrust laws.[11] Recent franchise shifts have occasioned similar fears, as must institution of the involuntary draft. All an investor has been able to "rely" upon is his estimate of the ability of Baseball effectively to *lobby* in Congress so as to prevent unduly adverse legislation. Is this the stuff of which a "reliance interest" is made? Wishful thinking about lobbying skill, however well-advised, is simply not "reliance" in a jurisprudential sense. It is opportunism.

We do not dispute that there are situations in which citizens are entitled to organize their affairs in "reliance" upon judicial decisions. Compare *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970) (deny "full retroactive effect" to protect issuers of bonds who relied on prior law governing voting in bond elections). But there is no precedent in this Court for permitting businessmen to rely, for generations, upon palpably erroneous interpretations of the Sherman Act at the expense of the public policy in favor of competition, and to the cost of individual human beings made vic-

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[10] One new investor testified that before purchasing the Kansas City franchise, he was advised by his attorney that "there was always the possibility of changes in the player situation due to the Players Association." (R. 1452) [A. 325]

[11] See Paul Porter's October 7, 1964 letter to the Baseball Commissioner recounting these fears, set out in Hearings Before Sen. Subcomm. on Antitrust and Monopoly, on S. 950, 89th Cong., 1st Sess. (1965) pp. 156-161.

tims of anti-competitive practices not permitted to other businessmen. Economic interests vastly larger than Baseball "relied," for example, upon the famous decision of this Court in *United States* v. *E. C. Knight Co.*, 156 U.S. 1, 12 (1895), that manufacturing within a single state was not "commerce" within the meaning of the Sherman Act — that "commerce succeeds to manufacture and is not a part of it." But that did not prevent this Court from totally discarding *E. C. Knight,* a process well described by Mr. Justice Jackson in *Wickard* v. *Filburn,* 317 U.S. 111, 119-129 (1942). Moreover, it is now clear, if it was not then, that "reliance" by economic interests upon prior doctrine obviously vulnerable to judicial or legislative correction provides little protection. In *Lear, Inc.* v. *Adkins,* 395 U.S. 653, 674 n. 19 (1969), the Court explicitly overruled prior doctrine—patent licensee estoppel. It forthrightly rejected arguments based on a "reliance interest," finding that justifiable reliance had been diminished by the perceptible erosion of the doctrine of licensee estoppel, that it was not convinced that real harm would in fact follow, and that the "public's interest" had to be weighed in the balance. The same result is required here.

Next, the allegation, never proven and largely irrelevant, that investments in Baseball would be imperiled if the reserve system is subjected to antitrust scrutiny is repudiated by developments in other sports. While Baseball mainains the general posture that only the reserve system in its present form enables a professional team sport to survive,[12] the record in other

[12] Although several of Respondents' witnesses, including Kuhn himself, did testify that change was inevitable and that the effect upon Baseball would depend upon the nature of the change. (R. 806) [A. 273]

organized professional team sports is to the contrary, for no other professional sport has found it necessary, or even desirable, to restrict player and team owner freedom as severely as Baseball.

Professional football, for example, permits its players to play one year without a contract, after which they cease to be members of a team and are free to negotiate with any other team owner,[13] the Commissioner being empowered to require the new employer to compensate the former employer where they cannot themselves agree. (R. 463, 466-68) [A. 213, 215-16] Players are also permitted to negotiate contracts which require their consent to a trade. (R. 469-470) [A. 217] And the Canadian League competes with the two American Leagues for players. (R. 474) [A. 218] More importantly, National Basketball Association owners have formally stated to Congress that they intend to virtually eliminate the reserve system from their sport. They have agreed, in a letter appended hereto as Appendix B, to allow rookie players to be tied to their initial employer for just one year following their original contract, while veteran players are to be free at the termination of each contract to negotiate with other employers. The NBA does propose certain restrictions which may or may not prove acceptable to the players, or permissible under the antitrust laws. The principal one is a provision that an "independ-

[13] The Commissioner of Professional Football testified at trial that ten players "played out their option" in 1969 (R. 463) [A. 213], and that players who had done so had signed with new teams (R. 468-469) [A. 216] The Commissioner of the National Basketball Association testified that he has approved contracts forbidding assignment without the player's consent (R. 521) [A. 223], and that his league's players sometimes "jump" to the competing American Basketball Association. (R. 523) [A. 224]

ent" panel of three representing both owners and players may fix the compensation due a player's former team from the team which signs him. Whatever the fate of this proposal, and we have no occasion to pass judgment upon it, it certainly demonstrates that basketball investors don't share the fears professed by Baseball. Indeed, one leading basketball magnate, Samuel Schulman of the Seattle Supersonics, was quoted in the press in February of 1971 as saying the following:

> "It is my feeling that sports would be better off with no reserve clauses. There is no reason why athletes should be chattels of the owners. Every performer should be free to negotiate for himself as people do in other businesses. If a guy in any sport doesn't want to play for Seattle or Los Angeles or Buffalo, or any other team, why should he be made to do so because the owners have decided that reserve clauses are good for the game? If all reserve clauses were thrown out, you would find after a while that everything would level off and no significant changes would be made."

When asked what would happen to an owner if richer ones decided to gather up all the talent, Schulman is quoted as replying,

> "He would be left with a choice. He would compete the best way he could or get out of sports. In other businesses of mine, I sign people to contracts of maybe one to five years. At the end of that time, they are free to stay, or move elsewhere. And life goes on. It would be no different in sports." [14]

[14] Mr. Schulman's statements are contained in a formal statement submitted to the Senate Antitrust Subcommittee inquiring into the proposed merger of the two professional basketball leagues. See Statement of Lawrence Fleisher for National Basketball Players Ass'n, before Sen. Subcomm. on Antitrust and Monopoly, on S. 2373, 92d Cong., 1st Sess. (Nov. 1971) p. 26.

It is significant that two post-*Toolson* investors in Baseball testified at trial that they simultaneously invested in local football teams—in Cincinnati and Los Angeles—despite their awareness that football *was* subject to the federal antitrust laws and had a reserve system much more permissive than Baseball's. (R. 1258, 1370) [A. 295, 305] So much for "reliance" on *Toolson*.

4. Congressional Inaction Since Toolson

Toolson emphasized the fact that Congress had not legislatively reversed *Federal Baseball Club*. A probable explanation is that decisions by this Court quickly stripped *Federal Baseball Club* of precedential force, removing the impetus for legislative tinkering with the Sherman Act. It is now clear, however, that the 1953 *per curiam* decision erred in attempting to read meaning into the mere failure of Congress to act. Recent decisions have reinvigorated the salutary rule that courts should not regard congressional inaction after controversial judicial decision as legislative ratification of that decision. See *Blonder-Tongue Labs.* v. *University Foundation,* 402 U.S. 313, 327 n. 17, and 342 n. 37 (1971) (bills to reverse a prior decision had died in committee); *Boys Markets* v. *Clerk's Union,* 398 U.S. 235, 240-242 (1970); *Moragne* v. *States Marine Lines,* 398 U.S. at 393, 405 n. 17; *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 609 (1966); *Helvering* v. *Hallock,* 309 U.S. 106, 120 (1940).

As the Court said in *Girouard* v. *United States,* 328 U.S. 61, 69 (1946), and reiterated in *Boys Markets,* supra, at 241: "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law."

Were the Court to reject this long line of cases and attempt to read meaning into the legislative record here, the result would not now lead to the *Toolson* result. As of 1965 Congress had declined to enact any one of sixty or more legislative proposals relating to the status under the antitrust laws of professional team sports. Most supported or proposed a more secure legal foundation for Baseball's reserve system than that furnished by *Federal Baseball Club* and *Toolson*. See Sen. Rep. No. 462, Sen. Comm. on Judiciary, 89th Cong., 1st Sess. (1965) pp. 8-12. All that can fairly be said is that there has been a stalemate. Neither proponents nor opponents have prevailed—hardly surprising in light of the relatively greater ease with which legislation can be averted rather than enacted. The only relevant legislation actually written into law in this period was the statute which explicitly exempted "football, baseball, basketball [and] hockey" from the federal antitrust laws for the narrowly limited purpose of negotiating collectively for national television revenues. 15 U.S.C. § 1291, 80 Stat. 1515 (1966). If this one enactment means anything, it is that Congress put Baseball in precisely the same category as professional football, basketball, and hockey, sports concededly under the Sherman Act, and concluded that Baseball, like these other professional team sports, needed a statutory exemption before its team owners could safely take concerted action of an anti-competitive character.

5. Prospective Judicial Relief.

To the extent that *Toolson* rested upon the alleged ability of Congress to provide a "prospective" remedy and upon the disability of the courts to act other than "retroactively," its foundation has proven wholly illu-

sory. In *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 24-25 (1964), and 396 U.S. 13, 14 (1969), this Court indicated that in an appropriate case, particularly where a newly announced rule is "innovative" and persons may have justifiably relied on prior rulings, a federal court may fashion partially prospective relief when plaintiff establishes a cause of action. In *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970), this Court reiterated this doctrine. It held that "in rare cases, decisions construing federal statutes might be denied full retroactive effect, as *for instance where this Court overrides its own construction of a statute. . . .*" (emphasis supplied) Justices Douglas, Brennan and Stewart indicated they would, in that very case, protect parties against fully "retroactive" application even of a decision overturning a dubious lower court precedent. 397 U.S. at 297-300. Mr. Justice Harlan elaborated on the circumstances in which he would deny full retroactive relief. 397 U.S. at 295-297. Not one member of the Court took the position that relief must always be fully retroactive. And in recent cases involving justifiable reliance by local governments and others who issued or purchased bonds under ground rules later found invalid, this Court has actually granted prospective relief. *Cipriano* v. *Houma*, 395 U.S. 701, 706, (1969) ("Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."); *City of Phoenix* v. *Kolodziejski*, supra. *Toolson*, accordingly, rests on an exceedingly weak reed.

The present situation almost precisely parallels *Boys Markets* v. *Clerks Union*, 398 U.S. 235 (1970). There,

the Court reconsidered its prior decisions in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), where it had interpreted a hotly contested provision of the Norris-LaGuardia Act, and had expressly invited legislative reconsideration. Congress was called upon to respond to the invitation, but did not enact into law the proposed legislation. In *Boys Market*, this Court declined to read any meaning into this inaction; instead, it reconsidered its earlier decision on the merits and overruled *Sinclair*.

Here, where it must be conceded that the precedential underpinnings of *Federal Baseball Club* have long ago disappeared, where this Court has repeatedly construed the identical statutory provision in a way inconsistent with *Federal Baseball Club*, where baseball owners have for twenty years been disentitled to rely upon any immunity from state law interference with the reserve clause and have themselves invited federal legislative consideration of the subject, where developments in other professional sports have made palpably untenable Baseball's continued "immunity," and when the availability of partially prospective judicial relief has now become established, there is no justification for not taking up the problem deferred two decades ago.

II. THE COURT BELOW ERRED IN FAILING TO APPLY STATE ANTITRUST LAW TO ORGANIZED BASEBALL'S RESERVE SYSTEM.

Once the Court of Appeals determined it had to follow *Federal Baseball Club*, it ought to have done so across the board; it should have concluded—as Baseball had itself forcefully represented both in *Federal Baseball Club* and in *Toolson*—that state and local laws are applicable if federal law is not. See Brief for Re-

spondent in *Federal Baseball Club*, No. 204, 1921 Term, p. 67; Brief for Respondent New York Yankees in *Toolson*, No. 18, 1953 Term, p. 30. But when the court turned to petitioner's state law claims, it accepted respondents' new position that Baseball was indeed "interstate commerce." It then compounded the error by ruling, without the "particularized inquiry" mandated by an unbroken line of decisions of this Court, that Baseball's involvement in "interstate commerce" somehow insulated it from all state antitrust laws.

While granting that the various state antitrust provisions do not appear to impose conflicting duties, and conceding there was no congressional mandate to displace state law, the court held, without examining the law of any particular jurisdiction, that the states had insufficient interest in their antitrust laws to warrant imposing whatever this undefined burden was upon Baseball. It simply declared that

> "[W]e do not find that a state's interest in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." 443 F.2d at 268. [A. 131]

The court was not able to cite any authority for the proposition that non-discriminatory state antitrust laws should be given an inferior place in the hierarchy of state values, or for the proposition that Baseball's self-interest was to be given more weight than the states' public interest in curbing group boycotts and blacklisting of professional baseball players.

There is no basis in the decisions of this Court under the Commerce Clause for this wholesale displacement

of state antitrust laws. What appears to have happened is that the court below scrambled two different rules—one requiring displacement of all state regulation when Congress has preempted the field, and another permitting only selective displacement of that state regulation which actually interferes with interstate commerce.

Huron Portland Cement Co. v. *Detroit*, 362 U.S. 440, 443 (1960), announced the two-part standard to be used in determining when non-discriminatory state regulation affecting interstate commerce is permissible. Mr. Justice Stewart wrote that:

> "Evenhanded local regulation to effectuate a legitimate local public interest is valid unless preempted by federal action . . . or unduly burdensome on maritime activities or interstate commerce."

The first of these two standards—that Congress has shown a requisite "clear and manifest purpose" to occupy the field—is surely not met here. And the court below did not suggest that it was.[15]

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[15] Judge Cooper did base preemption partly on legislative inaction after *Toolson*. 316 F.Supp. at 279. (R. 153A-154A) [A. 109-10] And two of the seven members of the state court in *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 990 (1966), took a similar position. But recent cases of this Court do not permit a conclusion of legislatively mandated preemption unless "Congress has unmistakenly so ordained." *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963). It should be noted that three members of the Wisconsin court held that state law *should* apply. (Two others joined a four-man majority in favor of Baseball, but on another theory.) In any event, the Wisconsin case is easily distinguished from the present one, for it involved a species of local protectionism—keeping a local enterprise at home—always suspect under the Commerce Clause. See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 145 (1970).

Nor is the second standard—undue burden on commerce—met here. In determining whether state regulation is unduly burdensome, this Court has always insisted upon what Mr. Justice Black termed "the importance of a particularized inquiry into the existence of a burden on commerce." *Colorado Comm'n v. Continental*, 372 U.S. 714, 720 (1963). It has never displaced even a single state's law without the most careful and scrupulous examination of the precise regulation involved, its purpose, and its impact upon the activity to be regulated. See, e.g., *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). Evenhanded state regulation is uniformly sustained except where there has been a showing (1) of actual irreconcilable conflict with applicable laws of another jurisdiction, *Bibb* v. *Navajo Freight Lines*, 359 U.S. 520 (1959) (displace Illinois mudguard law which imposes duty inconsistent with those imposed by sister states), and *Colorado Comm'n* v. *Continental*, supra, (sustain an antidiscrimination law where no conflict shown with valid law of another jurisdiction), or (2) of an intolerable—but clearly defined—imposition on industry or particular enterprise, *Pike* v. *Bruce Church, Inc.*, 397 U.S. at 144-146.

Here, there has been no showing either of conflict between applicable laws, or of unacceptable harm to Baseball. Indeed, the court below conceded that there appears to be uniformity among the applicable statutes, 443 F.2d at 267, and the trial judge concluded that Baseball could accommodate a much less onerous system of controlling its players. 316 F.Supp. at 284. (R. 171A) [A. 117-120]

Moreover, the only proper remedy where a state law is found too burdensome is to displace *that particular*

law. There is no precedent in the decisions of this Court for immunizing an entire industry from regulation by *any* state on the ground that *one* state might have a statute which cannot permissibly be applied to the industry. See, e.g., *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), where the Court displaced one state's statute—but left the railroads subject to less stringent laws of all other states.

The court below predicted that Baseball will adjust to the "most stringent" regime laid down by any state in which it operates. 443 F.2d at 268. [A. 130] Absent federal occupation of the field—and the Court of Appeals found none—all the Commerce Clause does for an enterprise not subjected to conflicting duties is to protect it against "a most stringent" law which goes too far. It does not provide protection against those laws which do not offend.

The decision below also seriously misconceived the complementary relationship of state and federal antitrust regulation. Senator Sherman in 1890 expressly justified the bill which became the Sherman Act on the ground that its "single object" was to "*supplement* the enforcement of the established rules of common law and statute law by the courts of the several states." 21 Cong. Rec., 51 Cong., 1st Sess. (1890), 2457. (Emphasis supplied.) The House Report on the Sherman Act stated that federal legislation "will prove of little value unless the states shall *supplement* it by such auxiliary and proper legislation as may be within their legislative authority." H.R. 1707, 51st Cong., 1st Sess. (1890), 1. (Emphasis supplied.) State antitrust law has, in fact, developed in parallel or supplementary form, rather than in conflict with federal antitrust law. State courts and legislatures have so regarded

their antitrust laws as in harmony with the Sherman Act, even applying Sherman Act precedents to construe the state statutes. See, e.g., *Chicago Title Ins.* v. *Great Western Fin. Corp.*, 70 Cal. Rptr. 849, 69 Cal. 2d 305, 444 P. 2d 481 (1968); 38 Ill. Ann. Stat. § 60-11 (Smith-Hurd, 1970). And this Court has consistently sustained the application of state antitrust law to conduct subject to the Sherman Act. *Giboney* v. *Empire Storage Co.*, 336 U.S. 490 (1949); *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937); *Tigner* v. *Texas*, 310 U.S. 141 (1940). For all practical purposes, state antitrust law is nothing more than a grant of supplementary authority to local officials and state courts to enforce substantive provisions which are carbon copies of the first two sections of the Sherman Act, plus prohibitions against deceptive trade practices—precisely the kind of supplementary state regulation permitted by this Court in *Head* v. *Board of Examiners*, 374 U.S. 424, (1963). See especially Mr. Justice Brennan's concurring opinion, 374 U.S. at 441-446, on the relationship of the FCC and the FTC to state regulation.

Finally, the decision below unneccessarily diminishes state antitrust law—indeed paralyzes it. The rationale of the court jeopardizes, for example, developing state efforts to protect consumers against companies engaged in interstate commerce but not now adequately regulated by federal law. If Baseball's self-interest in avoiding state regulation is superior to the states' public interest in dealing with group boycotts and blacklists directed against their citizens, why is a door-to-door seller's similar self-interest not superior to a state's interest in giving its citizens three days to cancel each sale? Or in requiring disclosure of the ultimate finance charges? And what other legitimate

public interests are threatened with subordination to private interest on the theory espoused below? As one distinguished state court has observed.

> "If state laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the states will be practically helpless to protect their citizens without ... a corresponding contribution to the national welfare." *Commonwealth* v. *McHugh*, 326 Mass. 249, 265, 93 N.E. 2d 751, 762 (1950).

Controlling decisions of this Court require that greater respect be paid to state antitrust policy than did the court below. See, e.g., *International Harvester Co.* v. *Missouri*, 234 U.S. 199, 209 (1934); *German Alliance Ins. Co.* v. *Hale*, 219 U.S. 307, 316 (1911).

This Court has never authorized the wholesale displacement of state statutes which have not been shown to be discriminatory, or to conflict with one another or with federal law, or to threaten a genuine and carefully defined harm to an interstate activity, which harm outweighs the local public interest. It has never preempted the laws of every state on the ground that one such law—were it to be examined—might prove offensive. It should not do so now.

III. THE SO-CALLED "LABOR EXEMPTION" DOES NOT INSULATE THE RESERVE SYSTEM FROM ANTITRUST SCRUTINY.

For half a century, Organized Baseball has succeeded in persuading one forum after another that "some other forum" is the appropriate one to deal with the abuses of the reserve clause. In its brief to this Court in 1922, Organized Baseball argued that

baseball should be exempted from federal antitrust regulation because

> "a state is entirely competent to reach and deal with any evil in the field of sport requiring legislative remedy."

Resp. Br., No. 204, 1921 Term, p. 67. It then told Congress that the federal courts were available. In the words of the Celler Subcommittee's 1952 report, Baseball

> "represented by eminent counsel, has assured the subcommittee that the legality of the reserve clause will be tested [in the courts] by the [Sherman Act's] rule of reason." H.R. Rep. 2002, 82d Cong., 2d Sess. (1952), 231.

Then, in 1953, Baseball successfully—if opportunistically—argued to this Court in *Toolson* that it ought not to subject the reserve system to the Sherman Act's "rule of reason" because Baseball was sufficiently regulated by state law. Respondent New York Yankees told this Court that a baseball game in Los Angeles is only

> "a local affair subject to the regulatory powers of the State of California and the City of Los Angeles."

Br. p. 30. But in 1966, Baseball argued to the Wisconsin state court that only *federal* law could regulate baseball adequately. *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, cert. denied, 385 U.S. 990 (1966). Then, in 1969, Baseball insisted in the National Labor Relations Board that any labor dispute in the sport would *not* substantially affect interstate commerce and, in any event, baseball was

now international in its operations: *American League & Ass'n of Umpires*, 180 N.L.R.B. No. 30, Case 1-RC-10414 (Dec. 15, 1969).

Now, having largely abandoned the argument in the Court of Appeals, Baseball suggests that this case is only a labor dispute over a mandatory collective bargaining issue, and is therefore somehow exempt from antitrust scrutiny. The suggestion is a shallow one.

Respondents are not labor organizations with a claim to exemption. They are businessmen, taking concerted action on a worldwide scale to eliminate competition in procurement of the key "commodity" in their industry—playing talent. And petitioner does not seek judicial redress for a labor dispute between himself and his employer. Rather, he charges that he has been damaged by respondents' industry-wide agreement to eliminate competition and by their boycotts.

Section 4 of the Norris-LaGuardia Act and Sections 6 and 20 of the Clayton Act do exempt certain activities of labor organizations, when acting alone, from the antitrust laws, for otherwise their routine functioning would not be possible. *United States* v. *Hutcheson*, 312 U.S. 219 (1941). But when, as in *Ramsey* v. *Mine Workers*, 401 U.S. 302 (1971), or *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), or *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), it is labor organizations—not businessmen—which are charged with antitrust violation, it becomes necessary to harmonize the policies of the antitrust and labor relations statutes.

In these cases, this Court concluded that when a labor organization acts "unilaterally" and in its members' interests—not by agreement with non-labor groups—

and on a matter of "immediate and direct" union concern, it is indeed insulated from the antitrust laws. But when even a labor organization, the express beneficiary of the statutory exemption, combines with a group of employers to eliminate competition by other employers, or to impose wage standards on other employers, the labor organization is liable for damages under the antitrust laws—this despite the fact that its members are the intended beneficiaries, and that the subject of agreement is wages or hours. *Ramsey* v. *Mine Workers*, 401 U.S. at 313. As the Court wrote in *Pennington*, the fact that parties must bargain "does not mean that the agreement reached may disregard other laws." 381 U.S. at 665. No Justice participating in any of these three recent decisions suggested that a labor organization would avoid antitrust liability if it participated in a hard-cord "anticompetitive commercial restraint" such as "pricefixing and market allocation"—or we might add, group boycotts. *Meat Cutters* v. *Jewel Tea*, 381 U.S. at 732-33 (concurring opinion).

The present case is an *a fortiori* one. Respondents here are not a labor organization, but businessmen who have agreed among themselves to eliminate competition in the most important phase of their enterprise. Their reserve system and the group boycott used to enforce it are not part of any collective bargaining agreement with the only labor organization in the industry, the small, 600-man Major League Baseball Players Association. Crucial parts of the arrangement to eliminate competition in the recruitment and retention of personnel appear only in rules promulgated by the employers themselves, and in whose promulgation the players play no part. Moreover, the reserve system and the group boycott used to enforce it affect not only the 600 members of the Major League Baseball Players

Association, but also countless numbers of unorganized players in the twenty-one minor leagues in the United States, Mexico and Canada, none of whom participates in collective bargaining. They also restrict the competitive freedom of minor league and team owners in countries as far away as Japan, with whom the Players Association has no relationship and who have agreed not to negotiate with petitioner and those similarly situated.

No decision of this Court immunizes such an anti-competitive agreement among businessmen, or the plainly unlawful technique they utilize to enforce it, from scrutiny under the federal antitrust laws. Indeed, it is well established that anti-competitive arrangements among businessmen do not escape the antitrust laws where they also implicate employee groups or purport to confer benefits upon them. In Mr. Justice Jackson's pungent phrase,

> "Benefits to organized labor cannot be utilized as a cat's paw to pull employers' chestnuts out of the antitrust fires."

United States v. *Womens Sportswear Mfr's Ass'n*, 336 U.S. 460, 464 (1949). See also *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797 (1945). An identical argument, that the reserve system and boycott generate a labor dispute resolvable only at the bargaining table or before the NLRB, was advanced by professional football in *Radovich*, and rejected by this Court as "without merit."

The result could not be otherwise. The broad contention that an employee's dispute with his employer over the terms and conditions of employment should be taken up through the collective bargaining process is hardly applicable to the present case. An engineer

employed by IBM and dissatisfied with the terms of employment, who is unable to achieve satisfaction through the collective bargaining process, is always free to seek employment with one of IBM's competitors, or with a company in an unrelated industry which has need of his engineering talent. But a baseball player has no such alternative, for every potential employer of his services in the United States and abroad has agreed in advance to refuse to deal with him. This agreement among businessmen violates the antitrust laws. It need no more be taken up in the collective bargaining process than would an agreement among employers to pay less than the minimum wage, or to discriminate in hiring on the basis of race.

There is considerable irony in the suggestion from Baseball that this litigation should be dismissed and the issues referred to the bargaining table so that the national policy of minimizing labor strife may thereby be vindicated. Does it really advance industrial peace to dismiss a two-year old litigation after a full trial in order to compel baseball players, whose average major league career is less than five years long, to strike to eliminate a system they have persistently deemed to be unlawful? (R. 1904-1905) [A. 376] And strike there would have to be. Baseball has demonstrated its adamant refusal to make even the slightest concession to the Players Association with respect to the reserve system. (R. 179, 281, 1889) [A. 167, 193, 367] It has even declined to agree to release players from its restrictions when they reach the advanced age of 65 — on the theory that this would "open the door" to greater liberalization. (R. 1893-95) [A. 369-71] And what good would a strike by the Players Association do for the thousands of minor league players who are not organized, or for marginal major league players

who may be forced to seek employment in the minor leagues, in Latin America, or in Japan?

The answer to anti-competitive practices by businessmen lies, not in labor strife, but in the antitrust laws.

CONCLUSION

Baseball's own economic expert witness, John Clark, testified at trial that the compensation paid to players has been a declining percentage of the industry's expenses.[16] He testified that front office expense has increased three times faster than have players' salaries—and that this did not indicate the players had a strong position. (R. 1818) [A. 359] He testified that the reserve system has not worked at "a satisfactory level" over the years to achieve what respondents claim is a principal objective—"a reasonable level of competition on the field"—for four teams have won 63% of the league championships in the last half century. (R. 1858) [A. 362-63] And baseball-team owners repeatedly testified that other professional team sports, using less restrictive devices to maintain player continuity, have not experienced the problems which Baseball contends would result if it were to follow their lead and ameliorate the reserve system. (R. 1258, 1405-1406) [A. 295, 312-13]

But as telling as such testimony was, it is largely beside the point. Neither federal nor state law permits

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[16] The record shows that players' salaries were 35.3% of major league team expenses in 1929, 28.9% in 1943, 24.8% in 1946, 22.1% in 1950, and 19-20% in 1970. (R. 1780-81) [A. 486] The average major leaguer earns only $44,090 over his full five-year career. (R. 1801-1802) [A. 355] Fully 109 of the 600 major league players in 1969 were paid the minimum salary permitted. (R. 1831) The median player salary increased only 17.7% between 1965 and 1969. (R. 1837) [A. 360]

businessmen to enter into worldwide agreements to eliminate competition in the procurement of essential commodities, or to enforce such agreements by group boycotts, whatever the purported economic justification. Petitioner has been the victim of these *per se* violations of law, and seeks redress. Although his right to that redress has not been rested in this Court on the national policies against slavery and peonage cited below, these policies do add urgency to his suit. For it is not right for this country to tolerate in any area of its national life, and perhaps particularly in what professes to be its national sport, arrangements which deny human beings the dignity and freedom guaranteed all Americans by Constitution, statute, and our ideals. The time has come to bring the national sport into the national mainstream.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Materials

U.S. Const., Art. I, Sec. 8:

"The Congress shall have power . . . to regulate Commerce with Foreign Nations, and among the several States, and with Indian Tribes. . . ."

U.S. Const., Amend. XIII:

"Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Section 1 of the Sherman Act, 15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 1581 of 18 U.S.C.:

"(a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"(b) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in subsection (a)."

Section 1994 of 42 U.S.C.:

"The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

Section 102 of 29 U.S.C.:

"In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."

Section 103 of 29 U.S.C.:

"Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

"Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby.

"(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

"(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization. Mar. 23, 1932, c. 90, § 3, 47 Stat. 70."

Illustrative State Statutes

CALIFORNIA

Business and Professions Code

Sec. 16720. A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: (a) To create or carry out restrictions in trade or commerce. [Calif. Bus. & Prof. Code § 16720 (West 1964)]

* * * * *

Sec. 16726. Except as provided in this chapter, every trust is unlawful, against public policy and void. [Calif. Bus. & Prof. Code § 16726 (West 1964)]

* * * * *

Sec. 16600. Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void. [Calif. Bus. & Prof. Code § 16600 (West 1964)]

THE DISTRICT OF COLUMBIA

Sherman Act

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [15 U.S.C. § 3 (1963)]

GEORGIA

Constitution

Article IV, Section IV. All contracts and agreements, which may have the effect, or be intended to have the effect, to defeat or lessen competition, or to encourage monopoly, shall be illegal and void. The General Assembly of this State shall have no power to authorize any such contract or agreement. [2 Ga. Stat. Ann. § 2701 (1948)]

Code

Section 20-504. A contract which is against the policy of the law cannot be enforced; such are contracts tending to corrupt legislation or the judiciary, contracts in general restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty. [20 Ga. Code Ann. § 504 (1965)]

ILLINOIS

Antitrust Act of 1965

Sec. 3. Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;

b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);

c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service; or

(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce. [38 Ill. Ann. Stat. § 60-3 (Smith-Hurd 1970)]

* * * * *

Sec. 11. When the language of this Act is the same or similar to the language of a Federal Anti-trust Law, the courts of this state in construing this Act shall follow the construction given to the Federal Law by the Federal Courts. [38 Ill. Ann. Stat. § 60-11 (Smith-Hurd 1970)]

KANSAS

Statutes

Section 50-101. A trust is a combination of capital, skill, or acts, by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any or all of the following purposes:

First. To create or carry out restrictions in trade or commerce, or aids to commerce, or to carry out restrictions in the full and free pursuit of any business authorized or permitted by the laws of this state [50 Kan. Stat. Ann. § 101 (1964)]

* * * * *

Sec. 50-102. All persons, companies, or corporations within this state are hereby denied the right to form or to be in any manner interested, either directly or indirectly, as principal, agent, representative, consignee or otherwise, in any trust as defined in section one [50-101] of this act. [50 Kan. Stat. Ann. § 102 (1964)]

Sec. 50-107. Any contract or agreement in violation of any of the provisions of this act shall be absolutely void and not enforceable in any of the courts of this state; and when any civil action shall be commenced in any court of this state it shall be lawful to plead in the defense thereof

that the plaintiff or any other person interested in the prosecution of the case is at the time or has within one year next preceding the date of the commencement of any such action been guilty; either as principal, agent, representative, or consignee, directly or indirectly, of a violation of any of the provisions of this act, or that the cause of action grows out of any business transaction in violation of this act. [50 Kan. Stat. Ann. § 107 (1964)]

MARYLAND

Constitution: Declaration of Rights

Art. 41. That monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered.

MASSACHUSETTS

General Laws

Every contract, agreement, arrangement, combination or practice in violation of the common law whereby a monopoly in the manufacture, production, transportation or sale in the commonwealth of any article or commodity in common use is or may be created, established or maintained, or whereby competition in the commonwealth in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within the commonwealth of the manufacture, production, transportation or sale of any such article or commodity, the free pursuit in the commonwealth of any lawful business, trade or occupation is or may be restrained or prevented; or whereby the price of any article or commodity in common use is or may be unduly enhanced within the commonwealth, is hereby declared to be against public policy, illegal and void. [93 Mass. Gen. Laws Ann. § 2 (1958)].

No person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing the employment of any person. [149 Mass. Gen. Laws Ann. § 19 (1958)]

MICHIGAN

Compiled Laws

Section 445.761. Section 1. All agreements and contracts by which any person, co-partnership or corporation promises or agrees not to engage in any avocation, employment, pursuit, trade, profession or business, whether reasonable or unreasonable, partial or general, limited or unlimited, are hereby declared to be against public policy and illegal and void. [Mich. Comp. Laws Ann. § 445.761 (1967)]

Section 445.762. Section 2. All combinations of persons, copartnerships, or corporations made and entered into for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy and illegal and void. [Mich. Comp. Laws Ann. § 445.762 (1967)]

MINNESOTA

Antitrust Act of 1971

Section 3. A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful. . . . [Minn. Stat. Ann. § 325.8014 (added by Session Laws of 1971, Ch. 865).]

Section 5. Without limiting section 3 of this act, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:

(1) A contract, combination, or conspiracy between two or more persons in competition:

(a) for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate, or fee of any commodity or service;

(b) affecting, fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of affecting, fixing,

controlling, or maintaining, the market price, rate, or fee of the commodity or service; or

(c) allocating or dividing customers or markets, functional or geographical, for any commodity or service.

* * * * *

(3) A contract, combination, or conspiracy between two or more persons refusing to deal with another person, except a refusal to deal by associations, trading boards, or exchanges when predicated upon a failure to comply with rules of membership. [Minn. Stat. Ann. § 325.8015 (added by Session Laws of 1971, Ch. 865).]

MISSOURI

Statutes

Section 416.010. Any person who shall create, enter into, become a member of or participate in any pool, trust, agreement, combination, confederation or understanding with any person or persons in restraint of trade or competition in the importation, transportation, manufacture, purchase or sale of any product or commodity in this state, or any article or thing bought or sold whatsoever, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and shall be punished as provided in sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400. [Mo. Ann. Stat. § 416.010 (1952).]

Section 416.030. Any two or more persons engaged in buying or selling any article of commerce, manufacture, mechanism, commodity, convenience, repair, any product of mining, or any article or thing of any class or kind whatsoever, who shall create, enter into, become members of or participate in any pool, trust, agreement, combination, confederation, association or understanding to control or limit the trade in any such article or thing, or to limit competition in such trade by refusing to buy from or sell to any other person any such article or thing aforesaid, for the reason that such other person is not a member of or a party

to such pool, trust, combination, confederation, association or understanding, or shall boycott or threaten any person from buying or selling to any other person who is not a member of or a party to such pool, trust, agreement, combination, confederation, association or understanding in such article or thing aforesaid, shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in sections 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400. [Mo. Ann. Stat. § 416.030 (1952).]

Section 416.040. All arrangements, contract, agreements, combinations or understandings made or entered into between any two or more persons, designed or made with a view to lessen, or which tend to lessen, lawful trade, or full and free competition in the importation, transportation, manufacture or sale in this state of any product, commodity or article, or thing bought and sold, of any class or kind whatsoever . . . are hereby declared to be against public policy, unlawful and void; and any person or persons creating, entering into, becoming a member of or participating in such arrangements, contracts, agreements, combinations or understandings shall be deemed and adjudged guilty of a conspiracy in restraint of trade, and punished as provided for in section 416.010 to 416.100, 416.240, 416.260 to 416.290 and 416.400. [Mo. Ann. Stat. § 416.040 (1952).]

NEW YORK

Consolidated Laws

Section 340. 1. Every contract, agreement, arrangement or combination whereby

A monopoly in the conduct of any business, trade or commerce or in the furnishing of any service in this state, is or may be established or maintained, or whereby

Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the fur-

nishing of any service in this state is or may be restrained or whereby

For the purpose of establishing or maintaining any such monopoly or unlawfully interfering with the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state any business, trade or commerce or the furnishing of any service is or may be restrained, is hereby declared to be against public policy, illegal and void. [N.Y. Gen. Bus. Laws § 340 (McKinney, 1968).]

OHIO

Code

Section 1331.01. As used in sections 1331.01 to 1331.14, inclusive, of the Revised Code:

(B) "Trust" is a combination of capital, skill, or acts by two or more persons for any of the following purposes: (1) To create or carry out restrictions in trade or commerce

* * * *

A trust as defined in division (B) of this section is unlawful and void. [Ohio Rev. Code Ann. § 1331.01 (1971).]

TEXAS

Business and Commercial Code

Section 15.02.

* * * *

(b) A "trust" is a combination of capital, skill, or acts by two or more persons to (1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business. [Tex. Code Ann. § 15.02 (Vernon, 1968).]

* * * *

Section 15.03. (a) It is a conspiracy in restraint of trade for . . . (2) two or more persons to agree to boycott, or

threaten not to buy from or sell to, a person because that person buys from or sells to another person. [Tex. Code Ann. § 15.03 (Vernon, 1968).]

* * * * *

Section 15.04. (a) Every monopoly, trust, and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02 and 15.03 of this code, respectively, is illegal and prohibited. [Tex. Code Ann. § 15.03 (Vernon, 1968).]

WASHINGTON

Code

Section 19.86.030. Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful. [Wash. Rev. Code Ann. § 19.86.030 (Supp. 1970).]

WISCONSIN

Statutes

Section 133.01. (1) Every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. [Wis. Stat. Ann. § 133.01 (West. 1957).]

APPENDIX B

NATIONAL BASKETBALL ASSOCIATION

September 2, 1971

Lawrence Fleisher, Esq.
15 Columbus Circle, 6th floor.
New York, N. Y.

Dear Mr. Fleisher:

By this letter, the National Basketball Association states in detail an offer embracing proposals heretofore made to the NBA Players Association through you as its representative, as clarified hereinafter. The proposals relate to Article 22 of the NBA Uniform player contract.

Preliminarily, permit me to advise you of a decision reached by the Board of Governors and independent of this offer. Subject to approval by the Players Association, which we assume will not be withheld, when a club exercises its option to renew an existing contract, the authority reserved therein by the club to reduce the compensation for the option year by as much as 25 percent will not be exercised. The compensation during the option year will remain the same as for the preceding season, and the provision in Article 22 permitting a reduction of up to 25 percent in compensation payable during the option year will be omitted from future player contracts.

Further permit me to advise you that it is the position of the NBA that Article 22 permits but a single exercise of an option to renew for one year, and that the contract if so renewed carries with it no further option to renew. NBA interprets Article 22 to mean that if a player plays out his option year, he is a free agent.

On behalf of NBA, I now set out the following five-point offer to the NBA Players Association:

1. The term of a rookie contract shall be for one year with an option in the club to renew the contract for

a single additional year at no reduction in compensation unless the club and the player involved agree on a longer term.

2. No option provision will be included in future contracts with veterans. A veteran is a player whose rookie contract has expired.

3. The option provision will remain in existing contracts.

4. Until the player has played the last game (including the last playoff game, if applicable) of the last season covered by his contract (and the option year, if any), he may not negotiate, or discuss terms of employment, with any club other than his own employer. Before a free agent whose contract has expired signs with another club, the former club, by meeting the highest offer made to the player, shall have the right to retain such player and sign him to a new contract.

5. If a player who has become a free agent by reason of the expiration of his contract signs with another club, a limited compensation shall be paid by the signing club to the club to which the player was formerly under contract, such compensation to be determined under the following procedures and principles:

   A. A three-member arbitration panel shall be established to which all such compensation cases shall be referred. The NBA Players Association and the Commissioner shall each select one member and the two members so selected shall select the third member, who shall chair the panel. In the event the third member is not agreed upon within 30 days, the third member shall be selected by the President of the American Arbitration Association. A vacancy in the panel shall be filled by the appropriate appointing authority.

B. In the determination of compensation, the following principles shall govern:

1. Impact of the transfer of the player upon the attendance and revenues from all sources of the club to which the player involved was under contract (the former club).

2. Impact of the transfer of the player upon the competitive ability of the former club.

3. Evidence of any special costs incurred by the former club, such as unusual and exceptional promotion activities designed to enhance the value of the player to the club.

4. The arbitrators shall not consider the difference between the level of contract payments to the player by the former club and the level of contract payments to be paid him by the club with which he has signed.

5. The arbitrators shall not award compensation so substantial as materially to discourage the movement of players from one club to another.

C. A compensation award by the arbitration panel, arrived at by the application of the foregoing principles, may be in the form of money, draft choices, assignment of player contracts, or any combination thereof as the decision specifies.

D. A decision of a majority (two) of the arbitrators shall constitute the decision of the arbitration panel.

However, in the event a majority of the arbitrators are unable to agree, the determination of the neutral arbitrator shall constitute the arbitration decision.

E. The expenses of each case shall be born equally by the two clubs.

The arbitration plan is designed to help maintain balanced competition among highly motivated and skilled teams. Balanced competition is the single, most important element in fan appeal. Without a widespread public demand for the sport, there can be neither clubs nor players. Conditions reasonably designed to foster balanced competition are, therefore, the legitimate concern of the general public as well as the clubs and the players.

The arbitration plan is important to balanced competition. Its aim is to provide a reasonable measure of compensation for the loss suffered by a club and by its remaining players and by its fans, if top stars sign with another club. But the arbitration plan does not seek that aim at the expense of a player's right, upon the expiration of his contract, to bargain freely for benefits commensurate with his ability. It bans the award of compensation to the former club at a level so high as to discourage the movement of players; and it excludes market value as an element of that award. It is, therefore, a reasonable step toward maintaining basketball as America's most widespread major professional team sport.

I need not emphasize something that both you and the members of the Players Association know, namely, the importance which NBA places on a merger of the two leagues. That and the draft are necessary elements to the preservation and growth of professional basketball as a highly competitive fan-oriented sport. Important also is the arbitration plan. Without these elements the public, the players and the owners will ultimately suffer by a weakening of the attractiveness of the sport. We, therefore, urge the Players Association to consider this offer in the serious spirit in which it is tendered. While we hope to pursue this offer with you at once, there can, of course, be no final agreement until we know the direction in which Congress is moving on the merger issue.

I am prepared immediately to discuss each element of this offer further with you.

May I have your early response.

Sincerely yours,

/s/ EDWARD S. NASH
Chairman
NBA Negotiation Committee

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD,

Petitioner,

v.

BOWIE K. KUHN, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	PAGE
Table of Citations	iii
Opinions Below	1
Questions Presented	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
The Parties and Proceedings Below	3
Factual Background	5
1. The Reserve System and the Historical, Competitive and Economic Realities of Professional Baseball	5
a. The Need to Maintain Balanced Competition	6
b. Preservation of Integrity and Public Confidence	8
c. High Costs of Player Development	9
d. Benefits of Economic Stability	10
e. Equivalent Practices in Other Professional League Sports	13
2. The Reserve System and Collective Bargaining	15
Summary of Argument	20
Argument	23
I. Sound Reasons Support Adherence To The Long, Unbroken Line Of Precedent In This Court Holding That Baseball's Reserve System Is Not Subject To The Federal Antitrust Laws	23

PAGE

A. This Court, While Consistently Reaffirming the Nonapplicability of the Federal Antitrust Laws to Baseball's Reserve System, Has Carefully Eliminated Any Possible Adverse Consequences of This Long-Standing Precedent 24

B. The Record in This Case Demonstrates Affirmative Grounds for Continued Adherence to *Toolson* 30

(1) Baseball's Continuing Reliance on this Court's Prior Decisions 30

(2) The Role of Congress 32

(3) The Role of Collective Bargaining 38

C. Petitioner Has Shown No Justifications Which Overcome the Weighty Considerations in Favor of Adherence to the Toolson Precedent 39

II. Federal Labor Policy Exempts The Reserve System From The Operation Of The Federal Antitrust Laws 45

III. Baseball's Reserve System Is Not Subject To State Antitrust Regulation 53

Conclusion 60

Addendum A A-1

Addendum B B-1

TABLE OF CITATIONS

Table of Cases:

	PAGE
Amalgamated Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676 (1965)	21, 48-52
American League and Association of Umpires, 180 NLRB 190 (1969)	55
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Foundation*, 402 U.S. 313 (1971)	42
Boys Markets, Inc. v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970)	42
California v. *Zook*, 336 U.S. 725 (1949)	56, 57
Canada Packers, Ltd. v. *A.T.&S.F.R. Co.*, 385 U.S. 182 (1966)	41
Carroll v. *American Federation of Musicians*, 372 F.2d 155 (2d Cir. 1967), *aff'd* in part and *rev'd* in part on other grounds, 391 U.S. 99 (1968)	51
City of Atlanta and Fulton County Recreation Authority v. *Atlanta Braves, Inc.*, Case No. B-17638, Atlanta, Ga., Sup. Ct., Feb. 8, 1966	55, 56
Clune v. *Publishers' Ass'n of New York City*, 214 F. Supp. 520 (S.D.N.Y. 1963), *aff'd*, 314 F.2d 343 (2d Cir. 1963)	52
Colorado Anti-Discrimination Comm'n v. *Continental Airlines, Inc.*, 372 U.S. 714 (1963)	56
Corbett v. *Chandler*, 346 U.S. 356 (1953)	25
Edward Katzinger Co. v. *Chicago Metallic Manufacturing Co.*, 329 U.S. 394 (1947)	43
Federal Baseball Club of Baltimore v. *National League*, 259 U.S. 200 (1922)	20, 23-28, 30, 32, 33, 57
Federal Baseball Club of Baltimore v. *National League*, 269 Fed. 681 (D.C. Cir. 1921)	24

PAGE

Fibreboard Paper Products Corp. v. *NLRB*, 379 U.S. 203 (1964) 47

Flood v. *Kuhn*, 443 F.2d 264 (2d Cir. 1971) 1, 5, 54, 55, 56

Flood v. *Kuhn*, 316 F.Supp. 271 (S.D.N.Y. 1970) 1, 5, 6, 12, 13, 15, 19, 37, 39, 43, 44, 45, 54, 55, 57, 58

Flood v. *Kuhn*, 312 F.Supp. 404 (S.D.N.Y. 1970) 29

Flood v. *Kuhn*, 309 F.Supp. 793 (S.D.N.Y. 1970) 1, 40, 44, 46, 58

Gardella v. *Chandler*, 172 F.2d 402 (2d Cir. 1949) 25

Hart v. *B. F. Keith Vandeville Exch.*, 262 U.S. 271 (1923) 25

Head v. *New Mexico Board*, 374 U.S. 424 (1963) 57

Helvering v. *Griffiths*, 318 U.S. 371 (1943) 41

Helvering v. *Hallock*, 309 U.S. 106 (1940) 27

Joint Industry Board v. *United States*, 391 U.S. 224 (1967) 41

Kowalski v. *Chandler*, 346 U.S. 356 (1953) 25

Lear, Inc. v. *Adkins*, 395 U.S. 653 (1969) 42, 43

MacGregor v. *Westinghouse Electric & Manufacturing Co.*, 329 U. S. 402 (1947) 43

Missouri v. *Ross*, 299 U. S. 72 (1936) 41

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 39, 42

Portland Baseball Club, Inc. v. *Frick (Baltimore Baseball Club, Inc.)*, 282 F. 2d 680 (9th Cir. 1960) 28

Portland Baseball Club, Inc. v. *Kuhn*, Civil Nos. 71-53, 71-54 D.C. Ore., December 28, 1971 28

Radovich v. *National Football League*, 352 U. S. 445 (1957) 23, 24, 27-30, 32, 33, 40, 41, 58

Salerno v. *American League*, 429 F. 2d 1003 (2d Cir. 1970), *cert. denied*, 400 U. S. 1001 (1971) 23, 28

Sola Electric Co. v. *Jefferson Electric Co.*, 317 U. S. 173 (1942) 43

PAGE

Southern Pacific Co. v. *Arizona*, 325 U. S. 761 (1945) 54, 55, 59

Teamsters Union v. *Oliver*, 358 U. S. 283 (1959) 21, 48

Toolson v. *New York Yankees, Inc.*, 346 U. S. 356 (1953) 5, 20, 23, 25-34, 37-44, 57, 58

United Mine Workers v. *Pennington*, 381 U. S. 657 (1965) 50, 51

United States v. *International Boxing Club*, 348 U. S. 236 (1965) 23, 27

United States v. *National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961) 36

United States v. *National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953) 36

United States v. *Shubert*, 348 U. S. 222 (1965) 23, 26, 32, 41, 58

United States v. *South Buffalo Ry. Co.*, 333 U. S. 771 (1948) 41

United States v. *Women's Sportswear Mfrs. Ass'n*, 336 U. S. 460 (1949) 51

Walling v. *Halliburton Co.*, 331 U. S. 17 (1947) 41

Wisconsin v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N. W. 2d 1 (1966), *cert. denied*, 385 U. S. 990 (1966) 20, 37, 53, 57, 58

Wisconsin v. *Milwaukee Braves, Inc.*, 1966 CCH Trade Cas. ¶71,738 (Wis. Cir. Ct., Civil Div., Mil. Cty., 1966) 56

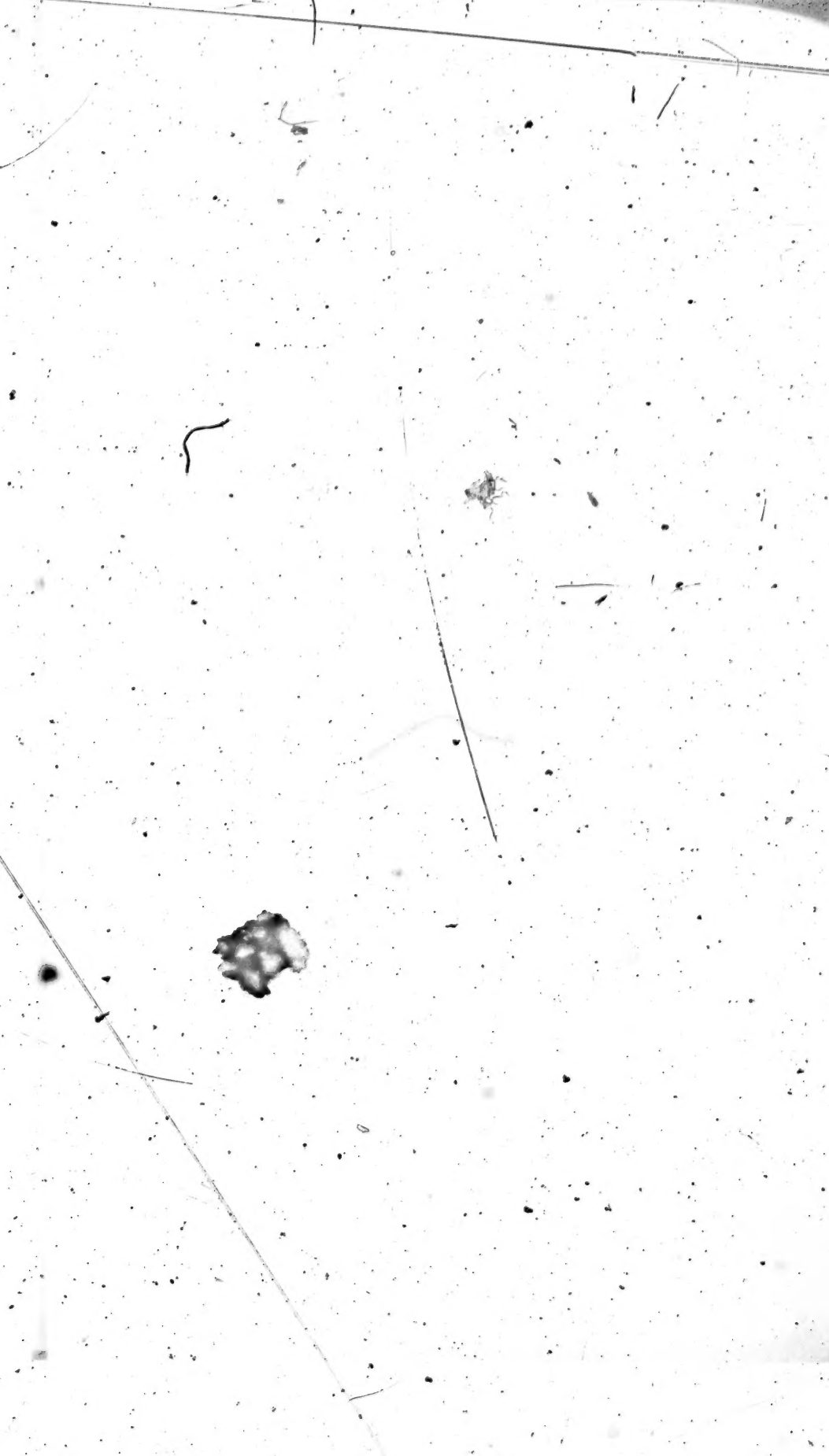
Table of Other Citations:

National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. §151 ..... 47, 52

Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. §102 47

Sports Broadcasting Act, 75 Stat. 732 (1961), 15 U.S.C. §§1291-1295; 80 Stat. 1515 (1966), 15 U.S.C. §1291 ..... 36, 37

Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. §141 47



IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD,

Petitioner,

v.

BOWIE K. KUHN, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the United States District Court for the Southern District of New York (App. 95-122) is reported at 316 F. Supp. 271. The opinion of the Court of Appeals for the Second Circuit (App. 125-141) is reported at 443 F.2d 264. Interlocutory opinions of the District Court with respect to Petitioner's application for a temporary injunction (App. 54-82) and Respondents' motions to dismiss (App. 83-94) are reported at 309 F. Supp. 793 and 312 F. Supp. 404, respectively.

Questions Presented

1. Should this Court abandon its long, unbroken line of decisions holding that baseball's reserve system is not subject to the federal antitrust laws, when the record in this action and the history of Congressional consideration

of baseball both provide compelling support for continued adherence to such precedents?

2. Does federal labor policy preclude application of the antitrust laws to baseball's reserve system, a mandatory subject of bargaining which has been dealt with in a collective bargaining agreement and has been under thorough and active consideration in negotiations between the major league baseball clubs and the Major League Baseball Players Association?

3. Should the nationwide framework of baseball be made subject to regulation under the antitrust laws of the various states, when such regulation by its inherent lack of uniformity would unduly interfere with baseball's interstate operations and would be inconsistent with the federal policy of continued self-regulation, subject to the will of Congress?

Constitutional and Statutory Provisions Involved

The pertinent provision of the Sherman Act (15 U.S.C. § 1) and excerpts from various state antitrust statutes are set forth in Appendix A to Petitioner's brief. Also involved are Article I, Section 8 and Article VI, Clause 2 of the United States Constitution which are set forth in Addendum A, annexed hereto.

Statement of the Case

This case involves a dispute over professional baseball's reserve system, which is the cornerstone of the game's league structure and competitive stability, and a central element in the employer-employee relationship between clubs and players. The reserve system is embodied in several provisions of baseball's Uniform Player's Contract and

the Major League Rules and includes various safeguards for the players as well as for the clubs.* In essence, the purpose and effect of these provisions are to enhance competition on the field and preserve the integrity of play by promoting continuity in the employment relationship between each of the 24 major league clubs and its 40 "reserved" players.

The Parties and Proceedings Below

This action, financed entirely by the Major League Baseball Players Association, the players' collective bargaining representative (App. 169; R. 112-13, 115), was brought in the name of Curtis Flood, who, until he departed from baseball in April 1971 for reasons unrelated to this case, had been a highly paid major league player.** In October 1969, Mr. Flood's contract was assigned by the St. Louis Cardinals to the Philadelphia Phillies, but he refused to honor the assignment. After some meetings with Players Association leaders, who were then in the midst of negotiations with the clubs regarding the reserve system and other employment matters (App. 167-68; R. 62, 109-10), Mr. Flood asked the Commissioner of Baseball on December 24, 1969, to advise all the major league clubs that he was

* The pertinent provisions are set out in Addendum B to this brief.

** Mr. Flood began his professional baseball career in 1956 under contract with the Cincinnati Reds, at a salary of $4,000. When his contract was assigned to the St. Louis Cardinals in 1958, he was given an opportunity to play regularly and his salary with the Cardinals steadily increased from $7,000 to $90,000 in 1969. Mr. Flood refused to play during the 1970 season at the $100,000 salary offered by the Philadelphia club, despite Respondents' offer that he could play without prejudice to this action. (App. 143, 145; R. 122-23, 372-73). After the 1970 season, the Philadelphia club assigned the right to Mr. Flood's contract to the Washington Senators, with whom Mr. Flood signed a contract to play during the 1971 season for $110,000. By agreement among the parties, this was without prejudice to Petitioner's rights in this action. On April 27, 1971, Mr. Flood left the Washington club for personal reasons and has not played since that date.

free to negotiate with any of them. (Pl. Ex. 4; R. 72.) The Commissioner responded that he could not grant the request because Mr. Flood's contract had been properly assigned in accordance with its provisions and because existing baseball rules prohibited his negotiating with other than the assignee club. (Pl. Ex. 5; R. 73.) Thereafter this action was commenced on January 16, 1970, and Mr. Flood declined the Commissioner's invitation to discuss the matter further. (R. 136-37.)

The defendants named in the complaint are Bowie K. Kuhn, individually and as Commissioner of Baseball,* Charles S. Feeney, individually and as President of the National League, Joseph E. Cronin, individually and as President of the American League, and the twenty-four clubs which then comprised the membership of the two major leagues.

The principal claims in the complaint are that the reserve system violates federal and various state antitrust laws.** Petitioner's brief (pp. 16-17, 45) asserts that the reserve system is a *per se* violation of those laws, and Mr. Flood himself testified at trial that he "would like the whole system to be struck down and declared illegal" (R. 118). All of the other witnesses presented at trial by Petitioner, however, assumed that the continuation of a reserve system was necessary. Their testimony focused on general player grievances regarding the present system and various modi-

* The Commissioner of Baseball is joined as a defendant in only the first alleged cause of action, the federal antitrust claim. Separate counsel for the Commissioner therefore join in those portions of this brief which deal with that claim. The Commissioner has an administrative and quasi-judicial role in baseball that requires him to investigate and take such action as will preserve the integrity of the game and further the interests of players, clubs and fans. Major League Agreement, Art. I (Pl. Ex. 6, pp. 501-02).

** Originally Petitioner claimed, as well, violations of anti-peonage statutes and the Thirteenth Amendment. Those claims, rejected by the District Court, were not asserted on appeal to the Second Circuit and are not asserted here.

fications of the system suggested by the Players Association, most of which had no direct bearing on Mr. Flood or his complaint.

After a three week trial on the merits, the District Court dismissed the complaint. 316 F. Supp. 271 (App. 95-122). The federal antitrust claim was dismissed on the authority of *Toolson v. New York Yankees, Inc.*, 346 U. S. 356 (1953); and the state law claims were rejected because state antitrust regulation would conflict with federal policy and because "uniformity [is required] in any regulation of baseball and its reserve system." 316 F. Supp. at 280 (App. 111). In its opinion the District Court set forth such findings of fact as were appropriate to its determinations.

The Court of Appeals for the Second Circuit unanimously affirmed the District Court's decision. 443 F.2d 264 (App. 125-41).

Factual Background

To evaluate properly the issues here involved it is essential to consider (1) the historical, economic and competitive realities which make the reserve system a necessity and (2) the role of collective bargaining in professional baseball as it relates to the reserve system and to the commencement of the present lawsuit.

(1) The Reserve System and The Historical, Competitive and Economic Realities of Professional Baseball.

As the District Court found, the reserve system, which is "perhaps the cornerstone of the present structure" of baseball, "has been in force for nearly one hundred years, almost the entire history of organized professional baseball." 316 F. Supp. at 273 (App. 98-99). The historical evidence presented at trial concerning the experiences of professional

baseball prior to the adoption of an effective reserve system showed "that chaotic conditions prevailed." (App. 243-48; Pl. Ex. 15-a, p. 229.) In those early days, players freely "revolved" among clubs, balanced competition was impossible to achieve, clubs failed—often in midseason—disrupting league play, and the game found little public acceptance. As a product of that climate, gambling and dishonesty were commonplace and "hippodroming"—which involved the fixing of games—became a practice. Player salaries were low and the failure of clubs often meant that salaries were never paid. The turning point in baseball's history came with the realization that a reserve system assuring player continuity was necessary. (App. 243-48, 253; R. 868.)

The District Court observed that, with the sole exception of Mr. Flood, all Petitioner's witnesses acknowledged that a reserve system "is a necessary element of the organization of baseball as a league sport. . . ." 316 F. Supp. at 275 (App. 101). (*E.g.*, testimony of Jackie Robinson, App. 172; Hank Greenberg, R. 247; and Bill Veeck, App. 384-85.) Respondents' witnesses, the Commissioner of Baseball, the Presidents of the American and National Leagues, club officials, former players, and John Clark, an economist and management consultant from Arthur D. Little, Inc., all testified as to the critical importance of the reserve system to baseball's existence. (*E.g.*, App. 243-48, 280-82, 337-40.)

Accordingly, the District Court found that "the preponderance of credible proof does not favor elimination of the reserve clause." 316 F. Supp. at 276 (App. 103). An analysis of the rationale of the reserve system fully supports this conclusion.

(a) *The Need to Maintain Balanced Competition.*

It is commonly recognized that professional baseball cannot function like the usual commercial enterprise, where each competitor has a strong incentive to strive to attain a greater market share and, if possible, put the others out

of business. On the contrary, the interests of the players and the clubs in baseball require that the strength of the teams in the leagues be reasonably evenly balanced. Thus there is a blend of competition and partnership among the clubs in baseball which would be both unnecessary and improper in the normal business world. (*E.g.*, App. 337-40, 399.)

The record shows that, without the balance provided by the reserve system, the clubs with greater financial resources would attract the most outstanding players. (*E.g.*, App. 280, 337; R. 1280-81.) The early history of the game —before the adoption of a reserve system—provides us with clear evidence of such results. Without the stability afforded by the reserve system, successful and reasonably balanced league play was impossible to maintain. (App. 243-48.)

Today, the forces that would create imbalance are at least as powerful as in those early days. The ability to compete for players varies widely from club to club. In 1969, for example, according to a study prepared by Arthur Andersen & Co.,* 13 of the 24 major league clubs suffered losses, some of them very substantial. The profitability of the other clubs varied widely, with the clubs in the larger cities having a continuing advantage in terms of revenue potential.** Accentuating this disparity in operating revenues, there are also great differences in the financial resources otherwise available to the various clubs. (R. 715-16, 1469-70.)

---

* Pl. Ex. 7, the Arthur Andersen study, is an exhibit submitted by Respondents in response to Petitioner's pretrial discovery requests and received by the District Court under seal for the use of court and counsel only. Such exhibit provides profit and loss data for the individual clubs and for the aggregate of all clubs for each of the years 1965-69. Reference is made to such exhibit for the financial details referred to herein.

** The aggregate results for all 24 clubs in 1969 showed total losses in the millions. (Pl. Ex. 7.)

Francis Dale, the President of the Cincinnati club, testified that his club could not engage in open competition for players with clubs located in the larger cities. "[I]n such a system the poorer or weaker franchises would not be able to compete for the better players and therefore baseball would be destroyed. . . ." (R. 1280-81.) Other club and league officials and the Arthur D. Little economist testified to the same effect. (*E.g.*, App. 280-81, 337, 342-43; R. 880, 1383, 1474.)

There is no way, without a reserve system, to prevent baseball's inherent gross disparities in income and resources from being translated into even wider disparities in team strength. The 1952 House Committee Report on Organized Baseball—an exhaustive study of the game and its history—put it quite plainly: "[E]xperience points to no feasible substitute to . . . guarantee a comparatively even struggle." House Report No. 2002, 82d Cong., 2d Sess. (1952), p. 229 (Pl. Ex. 15-a).*

(b) *Preservation of Integrity and Public Confidence.*

Without public confidence in its integrity, baseball would certainly fail. The Commissioner of Baseball, whose principal task it is to protect the integrity of the game, testified at length at trial concerning the relationship between the reserve system and integrity. (App. 253-54.) The uncontradicted history reviewed by him shows that in the era before the reserve system an unhealthy climate prevailed, which resulted in rampant dishonesty and public disrespect for the game. (App. 243-45.) This early history is strong

* Nevertheless, Petitioner argues that baseball's reserve system has not worked, pointing to the fact that "four teams have won 63% of the league championships in the last half century," as contrasted to the 25% which four teams would win in a perfectly balanced 16 team structure. (Pet. Br., p. 44.) What Petitioner overlooks is that no system can provide perfectly balanced competition, and that the reserve system has provided to the public continuously stimulating competition to a degree that would have been impossible without it. (App. 363-64.)

evidence that an effective reserve system is necessary to the maintenance of integrity. (App. 253-54.)

Integrity and public confidence are the product of numerous factors, including stable league organization, prosperity for the players, and rules enforced by the Commissioner prohibiting practices which would jeopardize the game's integrity. At the root of all of these factors is the reserve system, with the stability and continuity which it ensures.

To eliminate the reserve system would be to place in jeopardy the goodwill and public confidence which baseball has earned over the decades. As the 1952 House Committee said about the reserve system in its Report on Organized Baseball: "[E]xperience points to no feasible substitute to protect the integrity of the game. . . ." House Report No. 2002, 82d Cong., 2d Sess. (1952), p. 229 (Pl. Ex. 15-a).

(c) ***High Costs of Player Development.***

Witnesses for both parties to the present dispute recognized that the employment continuity provided by the reserve system is necessary to protect, and provide incentive for, the clubs' extraordinarily high player development costs. (*E.g.*, R. 247, 718-20, 1245-46.)

Unlike other professional sports which can select nationally known star players from college campuses where they have received extensive training, experience and publicity,* baseball must develop its own talent at great expense and effort (R. 938-39). According to the report prepared by Arthur D. Little, the player development costs and related expenses of minor league operations borne by the major leagues for the period 1963-67 totalled $118,000,000 (Def. Feeney Ex. S, App. 482.)

* Commissioner Rozelle of the National Football League and Commissioner Kennedy of the National Basketball Association both testified that the colleges provided the training grounds for their sports and President Campbell of the National Hockey League said much the same about Canada's amateur hockey program. (App. 229, 238-39; R. 485-86.)

This expenditure represents an average of $23,000,000 each year (almost $1,000,000 for each club), or 25% of the clubs' operating revenues. Stated otherwise, during that period the clubs spent $316,000 for each player brought up to fill vacancies on major league rosters. (Def. Feeney Ex. S, App. 482.) These expenditures support and make possible a large minor league system of over 150 clubs in 21 leagues, a system of player development peculiar to baseball which affords entertainment to twelve million fans annually. (Def. Feeney Ex. H; R. 994-95, 1106.)

These costs of player development give baseball clubs a greater stake in the control of their rosters than clubs in any other professional sport. The incentive to continue such expensive development is dependent upon the continuation of an effective reserve system to protect baseball's investments.

(d) *Benefits from Economic Stability.*

The stability engendered by the reserve system has permitted most baseball clubs over the years to achieve a measure of economic viability not possible before the reserve system was adopted. But such stability has not been a one-way street. The reserve system has also resulted in increased economic benefits to the players. Under the reserve system, major league baseball has grown to a nationwide structure of twenty-four clubs employing some six hundred players. (App. 249.) For *all* of these players, the economic rewards are impressive.

In 1970, the average major league player's basic salary was over $28,000, exclusive of bonuses, various cash allowances and other fringe benefits (R. 1659). Under the reserve system, each player negotiates salary adjustments

with his club annually.* The Arthur D. Little report showed that, for all players on major league rosters at least 60 days each year between 1965 and 1970, the average aggregate salary increase during the period was 129.4%. (Def. Feeney Ex. S, App. 473.)

In addition, through collective bargaining, players have received substantial increases in fringe benefits. (See pp. 15-17, *infra*.) The clubs' contribution to the players Benefit Plan, for example, totalled $5,450,000 in 1969, an increase of $2,850,000 over the contribution in 1965. (Def. Feeney Ex. S, App. 480; App. 493.) As a result, baseball offers its players a health care and pension program which is as fine as any in the nation.** For example, Mr. Flood, or any other player with twelve years of experience, is now entitled to a pension at age 65 of $1,625 per month or almost $20,000 per year. (Def. Feeney Ex. M; R. 1695.) Additionally, the 1970 collective bargaining agreement between the Players Association and the clubs resulted in gains for the players aggregating approximately $4,000,000 over three years, exclusive of pension and health care benefits. (App. 329.)

Overall, for 1965-69, the aggregate amounts paid in player salaries and benefits increased sharply, rising by approximately 50% during the period. (Pl. Ex. 7.)*** During this same period, there was a steady decline in the

*The players' collective bargaining representative, the Players Association, in recognition of the desirability of individual salary negotiation in baseball, has relinquished any role in this area except for the establishment of minimum salary levels. (Def. Feeney Ex. N, App. 422, 445.)

**The plan provides retirement benefits which may be elected as early as age 45, disability and widows' benefits, life insurance and accidental death and dismemberment benefits, health and dental care benefits and an optional severance allowance. (Def. Feeney Ex. S, App. 480; Def. Feeney Ex. M; App. 333-36, 493-95.)

***Petitioner's brief (p. 44) asserts that player compensation has declined as a percentage of baseball revenues. Although there has been a decline from the percentages recorded for the first half of this century, *the players' percentage of revenues has steadily increased in recent years.* The decline from percentages found in an earlier era is directly attributable to higher stadium and other operating costs and the burden of subsidizing the minor leagues which the major leagues have assumed in recent years.

net operating margin—computed on the basis of current cash items and considering only baseball operating expenses—realized by the clubs, from 12.5% of gross revenues in 1965 to 3.7% in 1969. (Def. Feeney Ex. S, App. 485-86.) Moreover, on a conventional accounting basis, the aggregate financial results for the twenty-four clubs showed losses in the millions. (Pl. Ex. 7.) Considering these facts, in conjunction with the increasing share of revenues currently devoted to player compensation, the Little report concluded that baseball is at a marginal level in generating operating revenue to pay operating expenses. (Def. Feeney Ex. S, App. 486.)

There simply is no evidence that the reserve system has had an adverse impact on the players as a whole. Star players, such as Mr. Flood, enjoy true star salaries and even marginal players are extremely well compensated by any standards.

The importance of the reserve system to baseball—all of baseball—cannot be seriously challenged. But Petitioner, despite the record at trial to the contrary, continues to argue that the reserve system is principally an instrument of oppression employed against the players.* The District Court provided a clear answer to that argument:

> "Prior to trial we gained the impression that there was a view, held by many, that baseball's reserve

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* Petitioner's brief attempts to describe some alleged abuses. It asserts that a club cannot release a player even if it wants to because other clubs have claiming rights to his contract. (Pet. Br., p. 9.) But, as a result of collective bargaining, the rule referred to was recently changed to permit a released player to refuse any claim and thus to choose his own club. Petitioner's brief also says that players "may not be accompanied in contract negotiations by any attorney, representative, or translator." (Pet. Br., p. 10.) But Petitioner's counsel knows better. The 1970 collective bargaining agreement contains a provision expressly recognizing the right of a player to be accompanied in salary negotiations by the representative of his choice. (Def. Feeney Ex. N, App. 423; App. 192-93.)

system had occasioned rampant abuse and that it should be abolished. We were struck by the fact, however, that the testimony at trial failed to support that criticism; we find no general or widespread disregard of the extremely important position the player occupies." 316 F.Supp. at 276 (App. 103).

(e) *Equivalent Practices in Other Professional League Sports.*

Petitioner's brief states that baseball's system is the most restrictive in professional sports and suggests that baseball's antitrust status has enabled it to retain practices not found in the other sports. (Pet. Br., p. 18.) But the evidence at trial demonstrated that the rules of football, hockey and basketball are essentially the equivalent of baseball's rules. Each sport drafts and reserves players, assigns or "trades" player contracts, prohibits "tampering" with rival players, functions under a Commissioner or President with powers similar to the Commissioner of Baseball, and operates with a system of league rules and a standard form of player contract.

Where there are differences, they are slight and more cosmetic than real. As to the most significant apparent difference, the so-called football option rule, Mr. Miller, the Baseball Players Association Executive Director, testified that the rule was a "semi-fraudulent" camouflage for its reserve system.* (App. 378-79.)

With respect to professional hockey the only noticeable difference is the procedure—recently adopted *as a result*

* In professional football, a player may announce at the beginning of a season that he intends to be a free agent at the end of that season. He then accepts a 10% salary cut and is free at the end of the season to contract with a new club *which must compensate his former club as directed by the Commissioner*. The evidence at trial indicated that as a result of this latter restriction very little player mobility has resulted. (App. 213-15, 386.)

of collective bargaining—for the arbitration of salary disputes, which at the time of trial had not been used. (App. 240-42; R. 588.) Otherwise, hockey's rules are essentially like baseball's. (Pl. Exs. 18, 19 and 20.)

The evidence at trial showed that the reserve system of the National Basketball Association is also essentially the same as baseball's. Indeed, the NBA renewal option clause is written in language almost identical to baseball's. (Pl. Exs. 16 and 17; App. 223-24.)

Since the trial of this action, as part of its efforts to persuade the basketball players association to join in supporting before Congress the merger of the two professional basketball leagues, the NBA has apparently offered to modify its reserve system in the manner indicated by the letter attached to Petitioner's brief as Appendix B. The circumstances surrounding this offer, *made in a collective bargaining context*, are not known to Respondents and are wholly outside the record of this action.

Petitioner had adequate opportunity to obtain the complete facts as to the other professional sports at trial when the Commissioner of each sport was present as a plaintiff's witness and the rules and player contracts of each sport were put into evidence. Dissatisfied with the evidence so adduced, Petitioner has turned his back on the record and relied instead on newspaper accounts and material taken from the current collective bargaining process of professional basketball. In any event, Petitioner's post-trial "evidence" of proposed modifications in the basketball reserve system cannot obscure the basic similarity of the systems employed by all professional league sports and only serves to emphasize what Respondents have said from the beginning—that collective bargaining can produce accommodation acceptable to all concerned.

(2) The Reserve System and Collective Bargaining.

Professional baseball players have an especially potent collective bargaining organization. As the District Court found:

> "The Major League Baseball Players' Association, organized in 1954, has proved a particularly effective bargaining representative obtaining since 1966 highly significant benefits for the players in such areas as pensions, life and disability insurance, health care, minimum salary, arbitration of grievances, expense allowances, maximum permissible salary cut, termination pay, representation at individual salary negotiations, negotiation of rule changes affecting player benefits or obligations, due process in player discipline." 316 F. Supp. at 283 (App. 116-17).

Ever since 1966, when full scale collective bargaining came to baseball, the reserve system—recognized by all parties as a *manddtory subject of bargaining*—has been among the subjects under negotiation between the clubs and the Players Association. 316 F. Supp. at 283 (App. 117).

In 1967, as part of the negotiations leading up to the adoption in February 1968 of the first "Basic Agreement" between the Players Association and the clubs, the Association included in its bargaining agenda a general suggestion that the reserve clause should be altered. (Def. Feeney Ex. O, App. 453-54; App. 503-09.) As modified in certain particulars,* the reserve system was incorporated into this Basic Agreement. (See pp. 45-47, *infra*.)

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* For example, the renewal option clause (Addendum B hereto) was amended to limit the salary reduction permissible upon contract renewals thereunder to 20% of the player's previous salary (Def. Feeney Ex. F, p. 16); the minimum player salary was raised by over 40% (Def. Feeney Ex. F, p. 15), and a formal procedure for arbitration of player grievances was established (Def. Feeney Ex. F, pp. 3, 18-24). Also, it was agreed that a joint labor-management study of the reserve system would be undertaken during the term of the agreement. The joint study subsequently took place as a "free-wheeling, in depth exploration" which both sides considered "useful." (App. 366, 510-12; R. 1918-20.)

In 1969, negotiations began on a new Basic Agreement. The Players Association presented the clubs with a list of "problems which stem from or are made more severe by the present reserve clause and related rules." (Def. Feeney Ex. Q, App. 462.) This list was carefully considered in negotiations between the parties and eventual accord was reached with respect to substantially all of the "problems" listed.*

Bargaining concerning the core of the reserve system as well was conducted by the parties; however, the Players Association did not make a specific proposal for a change in the system until October 31, 1969.** Shortly thereafter,

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* Among the various changes agreed to in the negotiations over the 1970 Basic Agreement were the following which are directly related to "problems" listed in the Players Association memorandum: (a) substantially increased termination pay, including a provision that after 1971 a player whose contract is terminated by the club after May 15 of any year will receive his full year's salary (App. 498, 500); (b) specific acknowledgment of each player's right to be accompanied at salary negotiations by a person of his choice (Def. Feeney Ex. N, App. 423; App. 518); (c) moving allowance provided for players whose contracts are assigned during the off season (Def. Feeney Ex. N, App. 421); (d) prohibition against clubs unilaterally changing rules which involve player benefits or impose obligations on players (Def. Feeney Ex. N, App. 422); and (e) provision for third-party arbitration of grievances (Def. Feeney Ex. N, App. 422).

** The proposal was that, after every three years of his career, each player may negotiate for a higher salary with any club, with his original club having a right of first refusal at the highest salary offered. The clubs, after giving this opening proposal thorough consideration at their regular winter meeting in December 1969, found it unacceptable. (Def. Feeney Ex. R, App. 470-72; App. 519.) Following commencement of this action, this specific offer was withdrawn by the Association, and various other suggested alternatives to the present reserve system were discussed. (App. 404-05.) Among these was the proposal that the reserve system be made inapplicable to a player after age 65. This tongue-in-cheek proposal, which Petitioner attempts to dignify in his brief (Pet. Br., p. 43), was neither seriously made nor received. (R. 1626-29.)

in November 1969, discussions were held between Mr. Flood and the Players Association concerning the filing of the present suit. At a meeting of the Players Association Executive Board in San Juan in mid-December 1969, at which Mr. Flood was present, the Association agreed to assume the financing of this action (App. 169). The complaint was filed on January 16, 1970.

Negotiations with respect to the reserve system, along with other important employer-employee issues, continued up to and briefly after the filing of the action. However, in February 1970, the parties found themselves frustrated by the litigation and therefore unable to bargain effectively on the reserve system. Accordingly, it was agreed that bargaining on the reserve system would be suspended pending the final outcome of the action; and the new three-year Basic Agreement*, ultimately entered into, contained a specific provision to that effect. (Def. Feeney Ex. N, App. 428; App. 368-69, 405-06.)

By the commencement of this litigation, the Players Association was able to transfer this segment of its labor relations dispute with the clubs to the federal courts. There the collective bargaining issues concerning the reserve system were extensively ventilated, so that at times the trial appeared to be a labor negotiation. Petitioner's

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* In addition to the player benefits referred to at pp. 15-16, *supra*, the new Basic Agreement *inter alia*: (a) liberalized contract provisions regarding participation in other sports (Def. Feeney Ex. N, App. 423; R. 269); (b) amended Paragraph 10(a) of the Uniform Player's Contract to provide that a player's salary can be reduced by no more than an aggregate of 30 percent in two successive seasons (Def. Feeney Ex. N, App. 422; App. 500; R. 273-75); (c) increased the players' share of the receipts of divisional playoff and world series games (Def. Feeney Ex. N, App. 418-19; App. 497-99); (d) substantially increased spring training and miscellaneous in-season expense allowances (Def. Feeney Ex. N, App. 419-21; App. 499-500); and (e) raised the minimum salary to $12,000 in 1970, $12,750 in 1971, and $13,500 in 1972 (Def. Feeney Ex. N, App. 419; App. 499).

principal witness, Mr. Miller, the Executive Director of the Players Association, put forth a number of possible modifications of the reserve system which he indicated might be acceptable to the Association. Respondents, in turn, presented comments on each of these proposals, which resulted in certain changes in the proposals tendered by the Association. (*E.g.*, R. 881-82, 1063-4, 1332.)*

Mr. Miller also testified that he had told the clubs' representatives that the action would be withdrawn if there were amendments in the reserve system "acceptable to the players as a group." (App. 369.) This statement perfectly characterizes the posture of the Players Association and Petitioner. Impatient with the process of collective bargaining, without cause to file an unfair labor practice charge for refusal to bargain, and eager to obtain the assistance of the federal courts to bend the clubs to their demands, the Players Association has Petitioner here seeking to have the federal courts act as arbitrator in the *compulsory arbitration* of its labor dispute with the clubs.

The District Court was well aware of the federal labor policy which sends the parties to the collective bargaining

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* As an example of this courtroom bargaining, Mr. Miller proposed that the clubs adopt an arbitration procedure for settling individual player salary disputes (App. 189-90). When Respondents' witnesses pointed out that the availability of arbitration would inhibit realistic negotiation between the player and his club—with each side being unwilling to make concessions which would impair its posture before the arbitrator—counsel for Petitioner responded by proposing that the arbitrator be limited to choosing either the final offer of the player or that of the club (R. 1332). Whatever the merits of this proposal, it plainly belongs on the bargaining table, not in the courtroom. Other possibilities suggested at trial by Mr. Miller and Petitioner's other witnesses included: automatic salary progression arrangements, reduction in the number of reserved players, separation of the National and American Leagues, a limitation on reserve rights to a fixed number of years for each player, and the adoption of long term contractual arrangements. (App. 180-81, 188-90, 385-86.)

table to seek their own accommodation, with the processes of the National Labor Relations Board being available to insure fair play. Thus, the District Court concluded that the issue of the reserve system, concededly a mandatory subject of collective bargaining, should be resolved by player-club negotiation rather than by the courts. The District Court, after reviewing all of the evidence, stated that negotiation preserving its "necessary features" would "fashion the reserve clause so as to satisfy all parties"; "these issues can and should be resolved by negotiations between the players and the club owners"; "the conflicts between the parties are not irreconcilable and . . . negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned—in essence, what is called for here is continuity with change." 316 F.Supp. at 276, 278, 282 (App. 103-04, 108, 115).

In an attempt to avoid the controlling labor relations significance of this dispute, Petitioner asserts the virtual bankruptcy of the collective bargaining process in baseball, arguing that player bargaining power is weak and that the clubs have adamantly refused to negotiate on the reserve system. (Pet. Br., p. 43.) But the District Court's opinion after trial is quite to the contrary. Far from finding the Association impotent and the clubs intransigent, the District Court stated that the Association was an "effective" representative and that the parties involved in collective bargaining, "positive and reasonable men who are equally watchful over a common objective, the best interests of baseball," are "best able to reach a satisfactory accord," and "that all avenues toward such an approach certainly have not yet been fully exhausted." 316 F. Supp. at 284 (App. 119-20).*

* Even if Petitioner were correct and the clubs had failed to bargain in good faith, the exclusive remedy would be to file an unfair labor practice charge with the National Labor Relations Board.

Summary of Argument

Petitioner asks this Court to hold the century-old fundamental operating arrangements of baseball *per se* illegal under the Sherman Act, (1) in the face of decisions of this Court running in an unbroken line for over 50 years that the internal structure and rules of baseball are not subject to that Act, and (2) in the face of this Court's determination that any change in baseball's status must be left to the more orderly processes of Congress. *Federal Baseball Club of Baltimore* v. *National League*, 259 U.S. 200 (1922); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953). In this formidable undertaking, Petitioner is allied with and financially supported by the Major League Baseball Players Association, collective bargaining representative of the players.

Prior to trial, Petitioner argued to the District Court that new facts and circumstances could be demonstrated which would show the present invalidity of this Court's baseball decisions. Put to his proof, Petitioner failed. The District Court found no new facts or circumstances to support the overturning of baseball's antitrust status.

But facts and circumstances were presented at trial which strongly support adherence to precedent. Continued reliance by baseball on the legality of its operations was demonstrated. The history of Congressional consideration of baseball's antitrust status showed thorough and constant attention, favorable findings, and no legislation disturbing this Court's rulings.

The vital importance of the reserve system to baseball was proved, as the evidence demonstrated that such a system was essential to maintain balanced competition and preserve the game's integrity. The economics of baseball were examined, and it was shown that player compensation is

excellent and that club operations are largely unprofitable. Also, baseball's player development operations were demonstrated to consume 25% of its revenues, a unique circumstance in sports which gives baseball clubs a vital stake in the talent which they develop.

Perhaps most significant, this action was recognized for what it plainly is—a labor dispute. The reserve system was conceded to be a mandatory subject of bargaining under the federal labor laws and the efficacy of collective bargaining in baseball was proved. Accordingly, the District Court concluded that the dispute represented by this action could best be resolved by the parties themselves through collective bargaining without outside interference.

All of these facts and circumstances, plus the important policy represented by the doctrine of *stare decisis*, compellingly indicate that this Court should reaffirm its precise and well-confined rulings that the fundamental structure and rules of baseball are not subject to the antitrust laws.

Moreover, the evidence adduced at trial demonstrated that federal labor policy also bars the application of the antitrust laws to the reserve system. *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959); *Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). As a mandatory subject of bargaining, the reserve system is automatically exempt under Justice Goldberg's concurring opinion in *Jewel Tea*. And as a matter exclusively affecting employees, with no anti-competitive effect beyond the bargaining unit, the reserve system also is exempt under Justice White's opinion in *Jewel Tea*.

State antitrust regulation has never been applied to baseball. Every court which has considered the issue has found such regulation to be inappropriate, either because of baseball's need for national uniformity and the serious interfer-

ence which piecemeal state regulation would cause, or because federal policy has endorsed baseball's self-regulation subject to the will of Congress.

Petitioner's principal contention against these points is that Respondents have succeeded, by various inconsistent arguments, in placing themselves above the law and that the federal antitrust laws must be applied if baseball is to be held accountable in any forum. This rhetorical contention is contrived.

Petitioner says that baseball argues to the courts that Congress is the proper forum for any reconsideration of baseball's status under the antitrust laws. Respondents do indeed take that position, supported by the repeated decisions of this Court precisely to that effect.

But Petitioner also says that baseball argues to Congress "that the courts are adequate and legislation unnecessary." (Pet. Br., p. 3.) This is simply not true. Baseball has never said to Congress that "the courts are adequate." What has been and is urged is the inapplicability of the antitrust laws, the effectiveness of self-regulation and collective bargaining, and the necessity for special sports legislation if federal regulation were ever found to be desirable.

Petitioner recognizes that baseball opposes state antitrust regulation. (Pet. Br., p. 3.) But Petitioner also says that baseball argues to proponents of federal regulation that "state regulation suffices." (Pet. Br., p. 3.) Again, Petitioner is quite mistaken. Baseball has consistently opposed any fragmentary and conflicting state antitrust regulation of its structure and rules.

Baseball remains subject to regulation by Congress at any time, and any determination concerning the application of regulatory measures should be left to that body. This Court should continue to adhere to its prior decisions holding the federal antitrust laws inapplicable to the structure and rules of baseball and should affirm the decisions below barring state antitrust regulation.

ARGUMENT

I.

Sound Reasons Support Adherence To The Long, Unbroken Line Of Precedent In This Court Holding That Baseball's Reserve System Is Not Subject To The Federal Antitrust Laws.

During the nearly one hundred years that baseball has developed and expanded with the reserve system as an integral part of the game, this Court has on at least five occasions, beginning in 1922, considered the question presented here—whether baseball's reserve system is subject to the federal antitrust laws.* Each time, the Court's conclusion has been the same: "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Toolson* v. *New York Yankees, Inc.*, 346 U. S. at 357.

Moreover, as this unbroken line of precedent continued, the Court repeatedly noted the significant reliance and *stare decisis* considerations which had grown out of and buttressed its earlier decisions in this area. It noted as well the flood of litigation and harassment that would ensue and the burden that would be placed upon baseball if its basic practices were exposed to antitrust attack. In view of these considerations, the Court concluded that "more

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* *Federal Baseball Club of Baltimore* v. *National League*, 259 U. S. 200 (1922); *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953); *United States* v. *Shubert*, 348 U. S. 222, 229-30 (1955); *United States* v. *International Boxing Club*, 348 U. S. 236, 242 (1955); *Radovich* v. *National Football League*, 352 U. S. 445, 450-52 (1957). See also *Salerno* v. *American League*, 429 F.2d 1003 (2d Cir. 1970); *cert. denied*, 400 U. S. 1001 (1971).

harm would be done in overruling" its prior decisions than in adhering to them. *Radovich* v. *National Football League*, 352 U. S. at 450.

A. This Court, While Consistently Reaffirming the Nonapplicability of the Federal Antitrust Laws to Baseball's Reserve System, Has Carefully Eliminated Any Possible Adverse Consequences of This Long-standing Precedent.

The first antitrust case involving baseball to reach this Court was *Federal Baseball Club of Baltimore* v. *National League*, 259 U. S. 200 (1922). The Federal Baseball Club claimed that the National and American Leagues, among the Respondents here, had conspired to monopolize the baseball business by means of its reserve system and league organization. The trial court found for the plaintiff, but the Court of Appeals reversed. 269 Fed. 681 (D.C. Cir. 1921). This Court, in an opinion by Mr. Justice Holmes, unanimously affirmed the decision of the Court of Appeals.*

It was clear from the outset that the Court's opinion in *Federal Baseball* was a limited decision, grounded on a realistic perception of the unique characteristics and needs of professional baseball in contrast to other business activities. Indeed, in its very next term, the Court, in another opinion by Mr. Justice Holmes, unanimously reversed a lower court's dismissal on the authority

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* Justice Holmes stated that "the decision of the Court of Appeals went to the root of the case. . . ." 259 U. S. at 208. The Court of Appeals had recognized baseball's unique needs, finding *inter alia* that: "If the reserve clause did not exist, the highly skillful players would be absorbed by the more wealthy clubs, and thus some clubs in the League would so far outstrip others in playing ability that the contests between the superior and inferior clubs would be uninteresting, and the public would refuse to patronize them." *Federal Baseball Club of Baltimore* v. *National League*, 269 Fed. 681, 687 (D.C. Cir. 1921).

of *Federal Baseball* of an antitrust complaint concerning the booking and presentation of vaudeville acts. *Hart* v. *B. F. Keith Vaudeville Exch.*, 262 U. S. 271 (1923). But the Court in *Hart*, as in subsequent decisions, referred to *Federal Baseball* and plainly left it undisturbed. 262 U.S. at 273-74.

As the years passed, professional baseball continued to be an unusually prominent aspect of American life. And the immunity from antitrust attack of its fundamental and structural agreements, regulations and player control arrangements was accepted as a settled fact in the baseball community.

In the late 1940's, however, the Court of Appeals for the Second Circuit, in a split decision, refused to follow *Federal Baseball* and reversed the trial court's dismissal of an antitrust complaint filed by a player against the then Commissioner of Baseball. *Gardella* v. *Chandler*, 172 F.2d 402 (2d Cir. 1949), *rev'g* 79 F. Supp. 260 (S.D.N.Y. 1948).*. Although Gardella's case was subsequently settled without further court proceedings, the Second Circuit's sudden departure from precedent quickly produced significant repercussions.

A number of lawsuits involving the reserve system were filed, three of which reached this Court,** directly challenging the *Federal Baseball* ruling.* The plaintiffs in two of these cases were baseball players, and in the third case the plaintiff was a minor league club owner. After hearing all

* Gardella had breached his contract with the New York Giants and signed to play in the Mexican League. As a result, he was declared temporarily ineligible for play in professional baseball by A. B. Chandler, then Commissioner of Baseball.

** *Toolson* v. *New York Yankees, Inc.*; *Kowalski* v. *Chandler*; *Corbett* v. *Chandler*. All three cases were decided at 346 U. S. 356 (1953).

three cases together, this Court explicitly reaffirmed the result of *Federal Baseball,* in *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356 (1953), with this *per curiam* opinion:

> "In *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs,* 259 U. S. 200 (1922), this Court held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws. Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without reexamination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S. at 356-57.

In subsequent decisions, this Court has reaffirmed and reiterated the special factual considerations which support continued adherence to *Federal Baseball,* while at the same time ensuring that enforcement of the antitrust laws in other areas is not affected.

In *United States* v. *Shubert,* 348 U. S. 222 (1955), the Court held the antitrust laws applicable to the operations

of theatrical booking agents, producers and theatre operators. Distinguishing the baseball cases, the Court stated:

> "In *Toolson*, where the issue was the same as in *Federal Baseball*, the Court was confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause.' During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed. Compare *Helvering* v. *Hallock*, 309 U. S. 106, 110. And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. Against this background, the Court in *Toolson* was asked to overrule *Federal Baseball* on the ground that it was out of step with subsequent decisions reflecting present-day concepts of interstate commerce. The Court, in view of the circumstances of the case, declined to do so. But neither did the Court necessarily reaffirm all that was said in *Federal Baseball*. Instead, '[w]ithout re-examination of the underlying issues,' the Court adhered to *Federal Baseball* 'so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' 346 U. S. at 357. In short, *Toolson* was a narrow application of the rule of *stare decisis*." 348 U. S. at 229-30.

Again, in *United States* v. *International Boxing Club*, 348 U. S. 236, 242 (1955), the Court, while holding the Sherman Act applicable to the activities of boxing match promoters, was careful to note that "none of the factors underlying the *Toolson* decision are present in the instant case."[2]

Finally, in *Radovich* v. *National Football League*, 352 U. S. 445 (1957), this Court again repeated in unequivocal

terms its ruling as to the inapplicability of the antitrust laws to professional baseball. While upholding in that case the sufficiency of an antitrust complaint brought by a player against professional football, this Court strongly reaffirmed the *Toolson* decision and further elaborated the important underlying considerations:

> "In *Toolson*, we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball*. The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." 352 U. S. at 450-51. (Footnotes omitted.)

In all of these cases, spanning many years, this Court has repeatedly and definitively resolved the issue presented here contrary to the position now urged by Petitioner. Seldom, if ever, has precedent so squarely and uniquely controlled a case as here.*

* Since *Radovich*, federal courts have on at least three occasions dismissed complaints against baseball alleging federal antitrust violations. *Portland Baseball Club, Inc.* v. *Frick (Baltimore Baseball Club, Inc.)*, 282 F. 2d 680 (9th Cir. 1960); *Salerno* v. *American League*, 429 F. 2d 1003 (2d Cir. 1970), *cert. denied*, 400 U. S. 1001 (1971); *Portland Baseball Club, Inc.* v. *Kuhn*, Civil Nos. 71-53, 71-54, D. C. Ore., December 28, 1971.

The baseball cases do not impair the enforcement of federal antitrust policy in any other area. This Court has made clear that the rule established in the baseball cases is strictly limited to organized professional baseball. *Radovich* v. *National Football League,* 352 U. S. at 451.

Moreover, baseball has always recognized the narrow applicability of such precedents even to it, and has never considered them blanket immunity from all antitrust regulation. Rather, baseball has interpreted the *Toolson* rule to mean only that its historic and evolving internal structure and rules are not subject to antitrust attack. The 1964 memorandum of Paul Porter, counsel for the Commissioner, to Commissioner Frick (referred to in Petitioner's Brief at p. 25) provides an illustration of this view.* Mr. Porter's memorandum considered the acquisition of the New York Yankees by the Columbia Broadcasting System and advised that *Toolson* did not cover any antitrust issues which might be presented by the acquisition by CBS of a baseball club. The District Court adopted this limited view of the scope of the *Toolson* doctrine (312 F. Supp. at 407 n. 3; App. 86) as did the Wisconsin Supreme Court in 1966. *Wisconsin* v. *Milwaukee Braves, Inc.,* 31 Wis. 2d 699, 725, 144 N.W.2d 1, 15 (1966), *cert. denied,* 385 U. S. 990 (1966). The Wisconsin Court observed that baseball's "exemption does not cover every type of business activity to which a baseball club or league might be a party . . ." but that coverage clearly includes at least baseball's "agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it." Nothing more than these fundamental structural elements and rules—the same matters repeatedly considered

* "Background Memo on CBS Acquisition of Yankees," Oct. 7, 1964, contained in the record of 1965 Senate Hearings on Professional Sports Antitrust Bill. *Hearings on S. 950 Before the Sub-Comm. on Antitrust and Monopoly of the Senate Judiciary Comm., 89th Cong., 1st Sess. (1965),* p. 159.

and found necessary by committees of Congress—have ever been presented to this Court; and it is only these essential sports aspects and practices which *Toolson* shields.

Despite Petitioner's arguments, there are no broad principles at stake here. The issue is simply whether this Court should abandon its historic position that the structure and rules of baseball are not subject to the antitrust laws. The record in this action utterly fails to support such a drastic step.

B. The Record in This Case Demonstrates Affirmative Grounds for Continued Adherence to *Toolson*.

(1) Baseball's Continuing Reliance on this Court's Prior Decisions.

Federal Baseball and *Toolson* have for decades provided baseball clubs with a clear guide for conduct, to enable them to plan their affairs with assurance. This judicial guide has been at the very core of the development of baseball as it is today.

The record in this case shows, without contradiction, that baseball clubs have continued since *Toolson* and *Radovich* to invest millions of dollars in player contracts and other baseball assets (Pl. Exs. 10-11), to build private stadiums and enter into long term leases on public stadiums (App. 290-91; R. 1454-58, 1752), to acquire new franchises at costs reaching ten million dollars each (Pl. Exs. 10-11) and to make numerous other commitments, all in reliance upon baseball's antitrust exemption and in particular upon the validity of baseball's reserve system.

The testimony of Francis Dale (App. 291-94), Ewing Kauffman (App. 325-26), John McHale (R. 1313-19) and Robert Reynolds (R. 1358-60), all men who have purchased

or participated in the purchase of major league clubs since *Toolson,* was unanimously and pointedly to the effect that the investments which they had made in baseball would never have been made if the baseball business were not protected by the *Toolson* exemption. In each case this reliance on baseball's historic exemption was quite explicit and significant, not merely a matter of casual interest.

Moreover, Mr. Kauffman, the president of the new Kansas City club, testified that his understanding of the reserve system—that he could retain control over the players which he developed—provided the rationale for his investment of well over a million dollars in his new baseball player academy (R. 1459-67). Mr. Kauffman brings to his academy young athletes with little or no baseball experience and little chance to reach college. At the academy the Kansas City club evaluates and develops their potential, while at the same time providing them with continuing education at the college level (R. 1461). Basic to this program is the knowledge that the Kansas City club will enjoy the benefit of the talent which his efforts may produce (R. 1459-67).

An examination of the Milwaukee Braves' prospectus of 1963 (Def. Feeney Ex. K), relating to the only recent public offering of stock in a baseball club, reveals the extent of investor reliance on the reserve system. The prospectus describes the reserve system, discloses that the Braves' player contracts constitute substantially all of its assets, describes each player under contract, and assures the investor that such contracts are "subject to the control of the Braves." (Def. Feeney Ex. K, p. 10.) It also observes that "the competitive success of a baseball club, which bears a strong relationship to its financial success, depends primarily upon the playing skill of players under contract to the club." (Def. Feeney Ex. K, p. 7.) Obviously, the reserve system was critical to any investor analysis of the Braves' offering.

Such examples could be repeated at length. The fact is that nothing could be more central to investor concern than baseball's antitrust status; and the continued reliance by baseball investors on *Toolson* strongly supports adherence to that decision. Judge Moore, concurring below, put it well:

> "Just as the Supreme Court in 1955 recognized that baseball 'had grown and developed' and 'in reliance on the *Federal Baseball* precedent,' *United States* v. *Shubert, supra,* 348 U. S. at 229, so much more has it grown between 1955 and 1971. The eight teams in each league have been expanded to twelve. . . . The reasons for adopting a 'hands off' policy by the courts of this particular sport have multiplied." 443 F.2d at 272 (App. 139-40).

(2) The Role of Congress.

In the *Radovich* decision, this Court plainly announced that baseball's status was for Congress to consider, not the courts. This Court held that "as long as the Congress continues to acquiesce we should adhere to . . . the interpretation of the [Sherman] Act made in" the earlier baseball cases. 352 U. S. at 451. This Court further stated:

> "We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike . . . . [T]he doctrine of *Toolson* and *Federal Baseball* must yield to any congressional action and continues only at its sufferance." 352 U. S. at 452.

Despite Petitioner's efforts to turn this Court's words upside down to impose on Respondents the burden of obtain-

ing Congressional action, the *Toolson* and *Federal Baseball* rule was plainly intended to stand unless and until disturbed by Congress. The history of Congressional consideration of this subject not only fails to show that the rule announced by this Court should be disturbed, it shows affirmative support for that rule.*

Immediately following the *Radovich* decision in 1957, Congress began intensive consideration of various legislative proposals dealing with the antitrust laws and professional team sports.**

Most of these proposals would have extended antitrust immunity to the basic sports structure and practices of football, hockey and basketball—to match baseball's immunity.*** Such immunity would have expressly included the employment, selection and eligibility of players and the assignment of their contracts. Some proposals would have completely exempted from the antitrust laws all professional league sports, while others would have revoked baseball's status under *Toolson*. The record of this Congres-

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* Prior to *Toolson*, Congress was principally concerned about the ossification of the major league map which was limited to the northeast quadrant of the country and did not reflect the westward movement of population. Since that time, major league baseball has moved west and south (and to Canada as well) to present the game to the public on a truly national basis.

** In the House, Emanuel Celler, Chairman of the House Antitrust Subcommittee, said on June 17, 1957, at the opening of hearings: "[T]he obligation rests upon the Congress to determine whether the Supreme Court decisions are discriminatory and, if so, how this discrimination should be resolved." *Hearings on H.R. 5307, et al., Before the Antitrust Subcomm. of the Comm. on the Judiciary, 85 Cong., 1st Sess. (1957)*, p. 1.

*** Baseball has consistently supported such legislation. *E.g.*, testimony of Ford C. Frick, Commissioner of Baseball, *Hearings on H.R. 10378 and S. 4070 Before Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm.*, 85th Cong., 2d Sess. *(1958), pp. 204-05; Hearings on S. 2391 Before Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 88th Cong., 2d Sess. (1964), p. 12.*

sional consideration is summarized in Defendants' Kuhn Ex. A, a stipulation covering the Congressional history during the period 1951-1970. Since November 1953, when the *Toolson* opinion was handed down, there have been over 50 bills introduced into Congress dealing with the applicability or non-applicability of the antitrust laws to organized baseball; and Congress has held numerous hearings during that time which have included consideration of the reserve system and the antitrust laws.

(1) In 1957, seven bills were introduced. They were of the three types referred to above. Approximately 30 witnesses testified in 15 days of hearings before the House Antitrust Committee concerned with these bills. *Hearings on H.R. 10378 Before Antitrust Subcomm. of the House Judiciary Comm., 85th Cong., 1st Sess. (1957).*

(2) In 1958, the House passed a bill exempting from the antitrust laws the essential structure and practices of all professional league sports, including their reserve systems (H.R. 10378). The bill had been amended on the floor of the House to delete language limiting the exempted activities to those "reasonably necessary." An identical bill was introduced in the Senate (S. 4070) and the Senate Antitrust Subcommittee held 12 days of hearings at which 37 witnesses testified. *Hearings on H.R. 10378 and S. 4070 Before Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 85th Cong., 2d Sess. (1958).* No action was taken on the Senate bill before the session ended.

(3) In 1959, hearings were held by the Senate Antitrust Subcommittee on a bill similar to the 1957 and 1958 bills, providing an antitrust exemption for the essential structure and practices of league sports. *Hearings on S. 616 and S. 886 Before Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 86th Cong., 1st Sess. (1959).* Hearings were also held in the House on comparable bills. *Hear-*

ings on H.R. 2370 et al., Before the Antitrust Subcomm. of the House Judiciary Comm., 85th Cong., 1st Sess. (1959).

(4) In 1960, hearings were held by the Senate Antitrust Subcommittee on a bill which would have continued baseball's antitrust exemption, with certain limitations, and granted antitrust immunity to the other league sports. *Hearings on S. 3483 Before Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 86th Cong., 2d Sess. (1960).* The bill was reported out, the limitations were removed on the floor, but the bill was recommitted and no further action was taken.

(5) In 1964, hearings were held by the Antitrust Subcommittee of the Senate on a bill similar to many of those previously introduced, granting exemptions for the essential structure and practices of sports. *Hearings on S. 2391 Before Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 88th Cong., 2d Sess. (1964).* The formal report of the Committee on the Judiciary concluded:

> "The Committee believes that the existing system of self-regulation in these team sports should be continued." Senate Report No. 1303, 88th Cong., 2d Sess. (1964), p. 8.

(6) In 1965 additional bills were introduced, similar to those considered in previous years. Hearings were held in the Senate. *Hearings on S. 950 Before Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 89th Cong., 1st Sess. (1965).* The Senate Antitrust Subcommittee reported favorably on a bill exempting the structure and fundamental practices of professional sports. Significantly, the Report stated:

> "These exemptions permit the use of the draft system and the 'reserve clause' in addition to regulations restricting the employment, selection and assignment

> of player contracts. The committee considers these exemptions as necessary to maintain competitive equality among the member clubs and leagues in the various sports." Senate Report No. 462, 89th Cong., 1st Sess. (1965), p. 13.

This bill was subsequently passed by the Senate, but no action was taken by the House.

Each bill which has passed either House of Congress (H.R. 10378, 85th Cong., 2d Sess. (1958) and Senate S. 950, 89th Cong., 1st Sess. (1965)), provided that the professional league sports would be exempt from the antitrust laws with respect to "the employment, selection or eligibility of players, or the reservation, selection, or assignment of player contracts", and provided as well that the franchise and league arrangements of the sports would be exempt.

Moreover, when Congress has enacted laws in the professional sports area, the effect of such laws invariably has been to codify or grant an antitrust exemption, not eliminate it. In 1961, Congress adopted the Sports Broadcasting Act, which permitted professional football,* and the other professional league sports, to adopt joint league telecasting practices. 75 Stat. 732 (1961), 15 U.S.C. §§ 1291-95.** In 1966, Congress enacted another measure for professional

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* Football had sought legislative action after it had been held in *United States v. National Football League*, 116 F. Supp. 319 (E.D. Pa. 1953) and 196 F. Supp. 445 (E.D. Pa. 1961), that certain aspects of its television policy were illegal under the Sherman Act.

** 15 U.S.C. § 1294 provides that: "Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the applicability or *nonapplicability* of the antitrust laws to any act, contract, agreement, rule, course of conduct or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply." (Emphasis added.)

Contrary to the inference which Petitioner attempts to draw from the inclusion of baseball in this statute (Pet. Br., p. 30), the word "nonapplicability" clearly indicates that baseball's antitrust exemption has not been supplanted by the more limited telecasting exemption. This reading of the Act is supported by its legislative history. See remarks of Congressman McCulloch, 107 Cong. Rec. 20,062 (1961).

football, this time to authorize the merger of the National and American Football Leagues. 80 Stat. 1515 (1966), 15 U.S.C. § 1291. Consideration is now being given to legislation which would authorize the merger of the National Basketball Association with the American Basketball Association and hearings are in progress before the Senate Judiciary Committee.

In addition to the NBA-ABA merger proposal, Congress has under current consideration bills which, like those discussed above, would either place baseball under the antitrust laws or extend to the other professional team sports an immunity for essential sports practices, including the player reserve system. S. 2499, S. 2616, H.R. 2305, H.R. 11033 and H.R. 10825, 92nd Cong., 1st Sess. (1971).

In the context of this Court's express invitation to Congress to consider the *Toolson* exemption, this history of Congressional activity and the failure of Congress to enact legislation disturbing baseball's exemption is highly significant, as the District Court recognized. 316 F. Supp. at 279 (App. 110-11). The Wisconsin Supreme Court described this significance quite clearly:

> "[S]ilence of Congress in this context demonstrates congressional recognition that league structure and the related agreements and rules are integral parts of professional baseball as it exists, and that the application of the familiar type of antitrust legislation to the structural arrangements of organized baseball is inappropriate; . . . there is to be self regulation [of baseball] until such time as Congress decides that the public interest requires other control." *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 730, 144 N.W.2d 1, 17, *cert. denied*, 385 U. S. 990 (1966).

Congress remains the proper avenue for any reconsideration of baseball's regulatory status. If regulation were ever found to be desirable, that regulation should take

other forms in preference to traditional antitrust regulation. Only Congress has sufficient flexibility and legislative power to shape regulatory policy for baseball on a fair and effective basis.

(3) The Role of Collective Bargaining.

In our Statement of the Case (pp. 15-19), the history and results of the labor negotiations in baseball are set forth. That recital abundantly demonstrates the efficacy of collective bargaining in baseball. This new avenue for agreement and accommodation between clubs and players provides a cogent additional reason for this Court to adhere to the *Toolson* rule.*

Toolson recognized that Congress was preferred to the courts as an agency for change in the baseball business. Now, a demonstrably effective player collective bargaining organization offers another agency for change in areas which, like the subject of Petitioner's complaint, are fundamentally labor-management disputes.

Modification of baseball's reserve system is possible—even likely. The Commissioner of Baseball testified at trial the reserve system is an "evolving" system and that he expected "it to continue to be an evolving system". (App. 273.) But such modifications should be worked out by the parties themselves as part of the entire fabric of baseball.

* Petitioner suggests that collective bargaining is only a partial answer here because minor league players are not represented by the Players Association. But Petitioner is a major league player, Respondents are the major league clubs, and the rules complained of here are the Major League Rules. The reality of the situation is that the Players Association and the major league clubs are the parties which deal with the subject of baseball's player arrangements, and there is no indication that these parties have disregarded minor league interests in resolving their disputes. To the contrary, the interests of minor league players—as major league trainees and past and future major league players—are constantly being advanced by the Players Association.

The District Court agreed, and observed that "the conflicts . . . are not irreconcilable and that negotiations could produce an accommodation . . . equitable to all concerned—in essence, what is called for here is continuity with change." 316 F.Supp. at 282 (App. 115). Antitrust litigation cannot produce such salutary results, it can only produce harrassment and disruption. Thus *Toolson*, in shielding baseball from antitrust litigation, promotes more rational and constructive evolution of baseball's reserve system.

C. Petitioner Has Shown No Justifications Which Overcome the Weighty Considerations in Favor of Adherence to the *Toolson* Precedent.

As this Court has recently stated: "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne* v. *States Marine Lines*, 398 U. S. 375, 403 (1970).

Petitioner sought a trial in order to demonstrate new facts about the baseball business since 1953, the year of *Toolson*, which he claimed would outweigh all such considerations. But at trial he was unable to do so.

Petitioner's main effort in this direction at trial was to point to the adoption of the free agent (or amateur) player draft in 1965 as a drastic additional restriction which allegedly weighs heavily against *Toolson*. (Pet. Br., p. 23.) That draft, to which Petitioner was never subject, permits the clubs to select negotiating rights to amateur players in reverse order of their league standing at the end of the preceding season. Such rights are valid for a six-month period,* after which an unsigned player becomes subject to

* In the other professional sports, all of which have amateur player drafts, the drafting club receives *perpetual* negotiating rights to the player. (Pl. Exs. 14, 17, 19-20.)

reselection by another club. The purpose of the draft is to enhance competitive balance by permitting the weaker clubs to have first chance at the available amateur players.*

The record indicates that this purpose has been achieved in that some clubs, especially the recent expansion clubs, have through the draft greatly improved their quality (App. 249-50; R. 1203-4). And from the standpoint of drafted players, there appear to be no serious drawbacks. The annual aggregate of bonus payments to such players upon the signing of their first professional contracts remained virtually the same after the draft rule was instituted as before, when all clubs could bid for a player's services. (Def. Kuhn Ex. C.) The District Court concluded that the draft did not "fundamentally" add to the restrictions of the reserve system and had no significance in considering the *Toolson* rule. 309 F.Supp. at 803-04 (App. 70-71).

In another direction, Petitioner now tries to denigrate baseball's reliance on *Toolson*, arguing that since Congress could place baseball under the antitrust laws at any time, *Toolson* offers "little . . . assurance." (Pet. Br., p. 24.) But Petitioner misses the point. Baseball's conceded amenability to Congressional regulation is different from—and far less disruptive than—vulnerability to antitrust litigation. This Court clearly recognized the difference in referring in *Radovich* to the "orderly" and "more accommodative" processes of Congress as opposed to the "harassment" of a "flood of litigation." 352 U.S. at 450-52.

* Commissioner Rozelle of the National Football League testified that professional football's college player draft was essential to league balance (App. 222), and Commissioner Kennedy of the National Basketball Association said that the adoption of a common college player draft was an important purpose of the proposed NBA-ABA Merger (App. 229).

Petitioner also argues that recent decisions of this Court have undermined, as supporting pillars of *stare decisis*, the importance of both reliance interests and Congressional approval by inaction. But there is nothing in this Court's decisions which indicates departure from the traditional views expressed in *Toolson*, *Shubert* and *Radovich*.

For example, in *Canada Packers, Ltd.* v. *A. T. & S. F. R. Co.*, 385 U. S. 182, 184 (1966), both Congressional approval and reliance interests were plainly recognized. This Court held that it should not "disturb" existing statutory construction when presented with a "long standing" rule, and no showing of "particularly unfortunate consequences", when Congress has not "seen fit to intervene".

In *Joint Industry Board* v. *United States*, 391 U. S. 224, 228-29 (1967) this Court noted that "in every Congress since [the prior decision] bills have been introduced to overrule or modify the result reached in that case" and held that "any new resolution . . . should come from Congress."*

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* To the same effect are *United States* v. *South Buffalo Ry. Co.*, 333 U. S. 771, 774-75, 784-85 (1948) (On questions of "statutory construction, not of constitutional import," Congress can "rectify" judicial mistakes; "Congress has considered the alleged mistake and decided not to change it."); *Walling* v. *Halliburton Co.*, 331 U. S. 17, 25 (1947) ("Knowing of the [prior] . . . decision, the Congress has permitted [the statute] . . . to stand unmodified and the courts have applied it as so construed. Employers and employees . . . have regulated their affairs on the faith of it."); *Helvering* v. *Griffiths*, 318 U. S. 371, 403 (1943) ("To rip out of the past seven years . . . a principle of law on which [the parties] . . . have acted would produce readjustments and litigation so extensive we would contemplate them with anxiety."); *Missouri* v. *Ross*, 299 U. S. 72, 75 (1936) (Congressional inaction considered "persuasive evidence of the adoption by [Congress] . . . of the judicial construction.").

The cases cited by Petitioner* are all quite distinguishable from this action in that none of them involves the combination of (1) a long standing statutory interpretation of perfect clarity in a non-constitutional area, (2) substantial reliance interests running to the very heart of a specific industry, (3) the absence of legislation despite thorough Congressional consideration, after an explicit invitation and (4) strong indications that more harm than good would come from an overruling. *Toolson*, on the other hand, derives its strength from exactly such a unique combination of factors.

Even on the limited points with which they deal, Petitioner's cases are distinguishable. In *Moragne*, this Court, in considering the possibility of Congressional acquiescence, observed that only one bill had been introduced in Congress and that no hearings had been held or scheduled. The Court noted as well that "'Congress has largely left to this Court the responsibility for fashioning the controlling rule of admiralty law.'" 398 U. S. at 405, n. 17. With respect to the *Boys Markets* decision, only two bills had been introduced and no hearings held or scheduled, and this Court could find no "persuasive circumstances evidencing a clear design." 398 U. S. at 242. In *Blonder-Tongue Laboratories*, Congressional consideration was cursory and sporadic and far from an indication of Congressional approval. In contrast, the record of Congressional consideration of baseball plainly reveals a continuous thoroughgoing inquiry into the *Toolson* ruling and quite persuasive evidence of a clear design to do nothing to reverse *Toolson*.**

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* *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971); *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375 (1970); *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970); and *Lear, Inc.* v. *Adkins*, 395 U. S. 653 (1969).

** Moreover, in none of these cases was there any reliance interest to be upset or any other destructive potential seen in overruling. In short, none of the underpinnings of *Toolson* was present.

On the issue of reliance, Petitioner cites *Lear, Inc.* v. *Adkins*, 395 U. S. 653 (1969). While it is true that reliance interests were asserted in that case, which overruled the common law patent licensee estoppel doctrine, this Court found that no "existing legitimate business relationships" would be undermined. 395 U. S. at 674, n. 19. In any event, the estoppel doctrine was "the product of a clouded history," as the Court noted. 395 U. S. at 671. Also, the doctrine had been substantially eroded, because patent licensees had long been able to assert patent misuse and other antitrust claims against their licensors* and the line between such antitrust claims and pure claims of patent invalidity was blurred at best.

Finally, Petitioner attempts to brush aside the strong reliance interests which have continued to grow out of this Court's baseball decisions with the vague suggestion that this Court could overrule those cases "prospectively." Petitioner does not, and cannot, indicate how any ruling altering the antitrust status on which the present baseball structure has been built could fail to have an enormous impact on the operation of baseball and the deep-rooted reliance interests involved here.

The radical and abrupt change in baseball's antitrust status sought by Petitioner—*from exemption to per se violation*—would not only expose the reserve system to violent change, and the creation of "chaotic conditions" as testified to by Petitioner's own witnesses. It would also directly threaten the very structure of the game. Almost

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* *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173 (1942); *Edward Katzinger Co.* v. *Chicago Metallic Manufacturing Co.*, 329 U. S. 394 (1947); *MacGregor* v. *Westinghouse Electric & Manufacturing Co.*, 329 U. S. 402 (1947).

every traditional element—including vital matters not now before the Court*—would be vulnerable to costly and disruptive litigation. Petitioner may have, as he asserts, no "obligation to demonstrate how baseball should be run" if its basic practices were declared *per se* illegal as he seeks. (Pet. Br. p. 17.) But this Court has recognized that it should consider the effect of its rulings and has determined that only the "orderly" and "accommodative" processes of Congress are appropriate to effect a change in baseball's antitrust status. There is no technique of prospective overruling which can alter that conclusion.

As the District Court noted in rejecting Petitioner's argument, "we do not believe the 'prospective' overruling suggested by Petitioner would vitiate all of these underpinnings of *Toolson*" (309 F. Supp. at 805, App. 73); such relief would be "unprecedented"; and inevitably, any order overruling the long-standing precedents in this area "might still have a serious retrospective effect on the reliance interests of baseball. . . ." 316 F. Supp. at 277 (App. 106).

Petitioner's arguments, both factual and legal, fail to approach the weight of the considerations which support adherence to this Court's prior decisions.

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* Among such matters are the territorial rights of clubs and leagues, the authority of the Commissioner and the agreements and rules which bind the league and club components of baseball together in an orderly structure.

II.

Federal Labor Policy Exempts the Reserve System From the Operation of the Federal Antitrust Laws.

The controversy between the parties in this case over the player contract provisions and rules which comprise the reserve system is fundamentally a labor-management dispute.

The reserve system has been acknowledged by all parties to this action to be a mandatory subject of collective bargaining. 316 F. Supp. at 283 (App. 117). The proof at trial demonstrated that the reserve system was, at the time the complaint in this action was filed, incorporated as part of the 1968 Basic Agreement with the Major League Baseball Players Association and a principal subject involved in the negotiation of the successor agreement. (Def. Feeney Ex. F, pp. 1, 11; App. 508-09.)

The negotiations leading to the 1968 Basic Agreement had produced important concessions on the part of the clubs. Among these were numerous changes in the Uniform Player's Contract (Def. Feeney Ex. F, pp. 15-17), including a substantial increase in the minimum salary, increase in various expense allowances, establishment of a formal grievance procedure, and a modification in the renewal option clause (the clause commonly referred to as the "reserve clause") to change the maximum permitted salary cut from 25% to 20%. The Basic Agreement incorporated the Uniform Player's Contract as modified and provided that "no other form of Uniform Player's Contract will be utilized."

Paragraph 9(a) of the Uniform Player's Contract had also been changed in the negotiations. In its old version, that paragraph simply recited that the club and player agreed to accept and abide by all provisions of the Major League Rules and that disputes were to be referred to the Commissioner. As a result of the bargaining, paragraph

9(a) was amended to provide that the club and player agreed to accept and abide by all provisions of the Major League Agreement, the Major League Rules and League Rules in effect on the date of the contract, to the extent that such provisions "are not inconsistent with" the agreed upon form of Uniform Player's Contract and the Basic Agreement. (Def. Feeney Ex. F, p. 16.) Moreover, the new paragraph recited that a copy of the Major League Agreement and Rules had been delivered to the player prior to the execution of his contract. In fact, printed copies of the Major League Agreement and Rules were distributed to all of the players—at club expense—as required by the contract.

The nature of these changes in the Uniform Player's Contract makes it plain that the Players Association had dealt with the reserve system and had agreed to be bound by it and all other provisions included in the agreed upon form of Player's Contract and rules, for the term of the Basic Agreement.

In an effort to avoid the significance of such history to this action, Petitioner now says that no agreement was reached.* (Pet. Br., p. 10.) But the Players Association has repeatedly and properly asserted player rights under provisions of the Uniform Player's Contract and Major League Rules; and a number of grievances have

* Petitioner also asserts that there was a finding that the reserve system "is not presently collectively agreed to." (Pet. Br., p. 9.) But the District Court's statement on this point (309 F. Supp. at 806 n. 51; App. 75), that the Petitioner was "probably correct" that no agreement was in effect, was made *before* trial in the context of considering Petitioner's injunction motion, without benefit of the uncontradicted evidence discussed above, and does not constitute any sort of "finding." The District Court did not rule on this issue after trial because of its disposition of this action under *Toolson*.

been brought to arbitration by the Association under the Basic Agreement grievance procedure seeking to vindicate those rights and to obtain favorable interpretations of various contract clauses and rules. Petitioner's argument that the contract clauses and rules which make up the reserve system *are not* collectively agreed to, while all contract clauses and rules which provide player safeguards *are* collectively agreed to—even though both were incorporated without distinction in the same Basic Agreement—is a totally illogical and insupportable view of contract interpretation and the realities of a collective bargaining accord. The first Basic Agreement expressly recognized that the Players Association had compromised its differences with the clubs on all subjects and had agreed that bargaining was at an end for the term of the agreement. (Def. Feeney Ex. F, pp. 1, 5.) Both halves of that bargain—not just the Association half—were encompassed by the Basic Agreement.

As the term of the first Basic Agreement neared its end, the subject of the reserve system was on the parties' bargaining agenda. But before negotiations on the successor agreement moved beyond the preliminary stage, and before the Basic Agreement was terminated, this action had been commenced.

The record reveals that the Players Association has directed and financially supported this litigation from the outset in an obvious effort to add leverage to its collective bargaining position. But federal labor policy precludes such a perversion of the antitrust laws. Congress has consistently stated that the goal of federal labor policy is the settlement of employer-employee disputes through the process of collective bargaining* and this Court has recognized that the policy of the federal labor statutes is to promote "the peaceful settlement of industrial disputes by subjecting labor-management controversies to

* Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C. § 102; National Labor Relations Act, 49 Stat. 449 (1935), 29 U.S.C. § 151; Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 141.

the mediatory influence of negotiation." *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U. S. 203, 211 (1964).

Moreover, this Court has specifically recognized that Congressional labor policy precludes judicial intervention in collective bargaining under the guise of antitrust enforcement. In *Teamsters Union* v. *Oliver,* 358 U. S. 283 (1959), the Court, holding that a state antitrust law could not be applied to prevent the contracting parties from carrying out their agreement upon a mandatory subject of bargaining, stated:

> "Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. . . . The purposes of the [federal labor] Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." 358 U. S. at 295. (Citations omitted.)

The same rationale was held applicable in *Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U. S. 676 (1965), with respect to the relationship of the federal antitrust laws to the federal labor acts. There the union and a multi-employer bargaining unit of food retail merchants entered into a collective bargaining agreement including a prohibition against the sale of fresh meat after 6:00 P.M. The Jewel Tea Company, which sold a substantial amount of pre-packaged meat, objected to signing the agreement because, while it had the salutary purpose of shortening the working hours of meat cutters, it also prevented the evening sale of meats pre-packaged by butchers during the day. Under threat of a strike Jewel Tea was forced to sign the agreement, but it then brought a Sherman Act action against not only the union but also the multi-employer group.

The Court held that the agreement was exempt from the Sherman Act, the majority splitting 3-3 as to the reasons for the decision. But under either of the two rationales expressed in that case, the reserve system is squarely within the antitrust exemption covering labor relations matters.

The opinion of Mr. Justice Goldberg, in which Justices Harlan and Stewart joined, stated a clear and easily applied rule that "collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws." 381 U. S. at 710. The opinion further stated:

> "To hold that mandatory collective bargaining is completely protected would effectuate the congressional policies of encouraging free collective bargaining, subject only to specific restrictions contained in the labor laws, and of limiting judicial intervention in labor matters via the antitrust route—an intervention which necessarily under the Sherman Act places on judges and juries the determination of 'what public policy in regard to the industrial struggle demands'." 381 U. S. at 710. (Citations omitted.)

The opinion emphasized that the history of the development of federal labor policy:

> ". . . makes clear that Congress intended to foreclose judges and juries from roaming at large in the area of collective bargaining, under cover of the antitrust laws, by inquiry into the purpose and motive of the employer and union bargaining on mandatory subjects. Such roaming at large, experience shows, leads to a substitution of judicial for congressional judgment as to how collective bargaining should operate." 381 U. S. at 716.

Under this opinion the reserve system, as a mandatory subject, is outside the reach of the Sherman Act.*

A somewhat different approach was taken in the opinion in *Jewel Tea* of Mr. Justice White, in which Chief Justice Warren and Mr. Justice Brennan joined. This opinion would not automatically prevent the application of the antitrust laws simply because the subject matter in dispute is a mandatory subject of collective bargaining. It calls instead for a comparative analysis of the impact of the policies of both the federal antitrust and labor laws. In *Jewel Tea,* there was a plain anticompetitive effect on the plaintiff, an employer member of the multi-employer bargaining unit, because it was not permitted to market prepackaged meats except during the hours when its fellow employer competitors engaged butchers. There was also an adverse effect on members of the public because they were precluded from purchasing prepackaged meats during evening store hours. But the policy of the labor laws was nevertheless found to be of greater weight, and an important element in this determination was the fact that a mandatory subject was involved. 381 U. S. at 689-91.

On the other hand, in *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965), a companion case to *Jewel Tea,* antitrust policy was found (over the dissent of Justices Goldberg, Harlan and Stewart) to outweigh labor policy. In that case, a coal mining company had agreed with a union to increase wage levels; and the union agreed to impose those wage levels on the company's smaller competitors, regardless of their ability to pay, in order to eliminate the smaller companies. The union's interest in

* Petitioner's brief (p. 41) argues that this opinion does not exempt "hard-core 'anticompetitive commercial restraint' ", suggesting that such restraints are present here. But the pages cited by Petitioner (381 U. S. at 732-33) refer explicitly to "nonmandatory subjects of bargaining" as distinguished from mandatory subjects such as the reserve system.

the mandatory subject of wages was plain, but the wage arrangement was found to be primarily a conspiracy to curtail competition outside the bargaining area and thus an antitrust violation.

In this case, as in *Jewel Tea,* the labor aspects predominate and labor policy should control. The issue here is purely between employers and employees, it is a mandatory subject, it has been dealt with in a collective bargaining agreement,* and it has been the subject of continued negotiations. The Players Association may not embrace the present system entirely, but it has bargained about it, reached accord and lived under it, benefited from the stability which it has engendered, and even now seeks only its modification—not its destruction. (App. 188-90.)

On the other hand, the only effect of the reserve system on competition is that it prevents the baseball clubs from freely acquiring each other's employees. Unlike the situations in *United Mine Workers* v. *Pennington,* 381 U. S. 657 (1965) and *United States* v. *Women's Sportswear Mfrs. Ass'n,* 336 U. S. 460 (1949), which are relied upon by Petitioner, the effects here are on participants in the bargaining (as in *Jewel Tea),* and not on competitors of the employer who are strangers to the bargaining. There is absolutely no antitrust issue here between economic competitors outside of the bargaining area. In such circumstances, labor policy should prevail over antitrust policy.

* Even if the reserve system were not part of a collective bargaining agreement it would make no difference. Unilaterally adopted work rules are exempt from the antitrust laws as long as the standards of *Jewel Tea* are otherwise met. *Carroll* v. *American Federation of Musicians,* 372 F. 2d 155, 165 (2d Cir. 1967), *aff'd in part and rev'd in part on other grounds,* 391 U.S. 99 (1968). The test is concerned with the subject matter at issue, not whether bargaining has culminated in agreement.

Petitioner, in his brief (pp. 40-42), dismisses the importance of *Jewel Tea* for the reason that Respondents are not a labor organization, and thus presumably the "labor exemption" cannot be applicable. This ignores the fact that the labor exemption as an expression of the policy of the federal labor acts is intended to protect the *"practice and procedure"* of collective bargaining. National Labor Relations Act, Sec. 1, 49 Stat. 449 (1935), 29 U.S.C. § 151. This goal can be accomplished only by exempting from antitrust attack the *subjects* of collective bargaining, not merely one of the parties. See *Clune* v. *Publishers' Ass'n of New York City,* 214 F. Supp. 520, 528-29 (S.D.N.Y. 1963), *aff'd,* 314 F.2d 343 (2d Cir. 1963). Petitioner's one-sided view of the labor relations antitrust exemption, leaving one party vulnerable and the other exempt, would plainly have a chilling effect on collective bargaining in general; and in particular on the process of bargaining in baseball about modifications to the reserve system.

It should not be overlooked that the issue of the reserve system—the sole issue in this case—has been dealt with by the parties at the bargaining table in the much wider context of the whole gamut of issues which have confronted them. In this context, concessions on one issue are made in exchange for concessions by the other party elsewhere. New concepts can be adopted on a temporary or limited basis to test their viability. Ultimately, matters are resolved by the parties who must live and work on a daily basis with the results of their arrangements. It is considerations of this sort which underscore the wisdom of federal labor policy and demonstrate why this is an appropriate case for application of that policy in preference to the policy of the antitrust laws.

III.

Baseball's Reserve System Is Not Subject to State Antitrust Regulation.

Neither the District Court nor the Court of Appeals found any merit in Petitioner's state law claims. Those claims had been fully litigated as recently as 1966 when the Wisconsin Supreme Court ruled that the interstate business of baseball could not be regulated by state antitrust law, because such regulation was foreclosed by the Supremacy and Commerce Clauses of the United States Constitution. *Wisconsin* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W. 2d 1, *cert. denied*, 385 U. S. 990 (1966).

As the District Court observed in agreeing with the Wisconsin decision:

> "Certain of the majority [of the Wisconsin Supreme Court] were of the opinion that state regulation was preempted because it would interfere with a Congressional policy permitting self-regulation for baseball which they saw as implicit from the silence of Congress in this particular context. Others in the majority preferred the view that the national character of organized baseball and the necessary inter-dependence of the teams requires uniformity of regulation and that 'since organized baseball operates widely in interstate commerce, the regulation, if there is to be any, must be prescribed by Congress'." 309 F. Supp. at 807 (App. 77).

The dual rationale of the *Wisconsin* case is fully applicable and controlling here.

It is a long-recognized imperative of the Commerce Clause of the federal Constitution that state and local laws

may not unreasonably and unduly burden interstate commerce. Petitioner argues that state antitrust regulation would not be burdensome. But the District Court, after considering the nature of the baseball industry and the provisions of the various state laws Petitioner attached to his post-trial brief, found otherwise:

> "We do not believe that the operation of baseball and its reserve system is a matter which admits of diversity of treatment. State and local laws may not unduly burden interstate commerce.
>
> • • •
>
> "As we see it, application of various and diverse state laws here would seriously interfere with league play and the operation of organized baseball." 316 F. Supp. at 280 (App. 111).

The Court of Appeals agreed, and rejected Petitioner's suggestion that the burden could be avoided by compliance with the strictest state standard:

> "Professional baseball clubs, although existing as separate legal entities, are organized into so-called leagues for competitive play and are dependent on the league playing schedule to further the ends of their sports competition. Therefore, it is the league structure at which any state antitrust regulation must be aimed if organized professional baseball is not to be severely fragmented. On the one hand, it is apparent that each league extends over many states, and that, if state regulation were permissible, the internal structure of the leagues would require compliance with the strictest state antitrust standard. The consequent extra-territorial effect of necessary compliance would be considerably more farreaching than that in *Southern Pacific Co.* v. *Arizona, supra.* On the other hand, we do not find that a state's inter-

> est in antitrust regulation, when compared with its interest in health and safety regulation, is of particular urgency. Hence, as the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce clause precludes the application here of state antitrust law." 443 F.2d at 267-68 (App. 130-31). (Footnote omitted.)

This ruling is entirely consistent with the principles developed in *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945), in which this Court held that:

> "[T]he states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." 325 U. S. at 767.

There can be no doubt that uniformity of regulation is required insofar as baseball is concerned. To permit application of the various state laws, as Petitioner seeks, would "seriously interfere" with the operation of baseball, because nonuniform regulation would make league play impracticable.* 316 F. Supp. at 280 (App. 111).

In fact, there has never been any state antitrust regulation of baseball. Only the State of Wisconsin has attempted local regulation, and that attempt spawned nothing but conflict and disruption. The Wisconsin trial court ordered the Braves baseball club to return to Milwaukee from Atlanta where it had relocated, the federal district court in Houston enjoined the enforcement of the order of the Wisconsin

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* The NLRB, in asserting jurisdiction over baseball, noted that: "[I]t is apparent that the Employer [baseball], whose operations are so clearly national in scope, ought not to have its labor relations problems subject to diverse state labor laws." *American League and Ass'n of Umpires*, 180 NLRB 190, 192 (1969). (Footnote omitted.)

court, and a Georgia state court ordered the same club to remain in Atlanta. *City of Atlanta and Fulton County Recreation Authority* v. *Atlanta Braves, Inc.*, Case No. B-17638, Atlanta, Ga., Sup. Ct. (Feb. 8, 1966). The Wisconsin trial court (or a board or commission to be created by it) was also prepared to preside over the creation of a new major league club and to determine the players to be assigned to that new club from other clubs, and the consideration to be paid for them, as well as other details of the entry of the new club into the baseball structure. *Wisconsin* v. *Milwaukee Braves, Inc.*, 1966 CCH Trade Cas. ¶ 71,738 at pp. 82,411-12 (Wisc. Cir. Ct., Civil Div., Mil. Cty., 1966). The power of state courts in this area, once unleashed, could be disastrous.*

The Wisconsin attempt at regulation, properly foreclosed by the Supreme Court of that state, indicates the kind of state conflict which is quite probable** and illustrates the

* Petitioner asserts in his brief (Pet. Br., p. 35) that the Court of Appeals below held that state antitrust regulation would not involve any conflicts. On this point, he plainly misreads that court's opinion. 443 F. 2d. at 267 (App. 129-30). Moreover, Petitioner has himself (in his brief to the Court of Appeals) indicated conflict by stating that the rule of reason would apply to the reserve system in several states while in others there would be a *per se* violation. If Petitioner were right, a finding of reasonableness under the laws of the rule-of-reason states would be in total and irreconcilable conflict with those of the *per se* states. It should also be noted that the antitrust laws of Texas, Missouri and Massachusetts appear to be inapplicable to the activities of baseball, either because they do not apply to service businesses or because they are inapplicable to interstate commerce, and the Wisconsin Supreme Court has specifically barred the application of Wisconsin antitrust law to baseball.

** Petitioner contends that under present law *actual* conflict of regulation must be shown to invalidate state regulation under the Commerce Clause. (Pet. Br., p. 35.) But Petitioner is demonstrably wrong in this contention. The authorities all agree that the *logical possibility* or *probability* of diverse or conflicting regulation must be considered in determining whether the Commerce Clause is a bar to state regulation. *E.g., Colorado Anti-Discrimination Comm'n* v. *Continental Airlines*, 372 U. S. 714, 721 (1963); *Cali-*

wisdom of the District Court's determination that the application of diverse state laws would "seriously interfere with . . . the operation of organized baseball." 316 F. Supp. at 280 (App. 111).

The other rationale of the *Wisconsin* decision provides a separate controlling reason for the denial of state regulatory power. That rationale is not, as Petitioner continues to assert, that the Sherman Act has pre-empted state antitrust law. Rather, the rationale is that the policy of the federal government has been consistently to exempt baseball from the operation of all antitrust laws. Therefore, Petitioner seeks to contradict federal policy when he seeks state regulation of baseball.

As the court in the *Wisconsin* case observed, in coming to the conclusion that federal policy precluded state regulation:

> "Some members of this Court, including the writer of this opinion, conclude that the silence of Congress in this context sufficiently implies such policy, and that application and enforcement of a state antitrust law to decisions of the league as to the location of franchises and membership in the league would conflict with the national policy in this segment of interstate commerce." 31 Wis. 2d at 730, 144 N. W. 2d at 17.

The District Court echoed this analysis, indicating that it was necessary to do so in order to give effect to the rationale of *Toolson*:

> "We believe it unlikely that the Supreme Court would have held, as it did, that baseball's reliance interests precluded overruling *Federal Baseball* and that 'Congress had no intention of including the business of baseball within the scope of federal antitrust

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fornia v. *Zook*, 336 U. S. 725, 735 (1949); *Head* v. *New Mexico Board*, 374 U. S. 424, 429 (1963). In any event, actual conflict arose in the *Wisconsin* case, and such conflict would be repeated if the *Wisconsin* rule were abandoned.

> laws,' if it considered baseball vulnerable to state regulation. Enforcement of such state laws would appear to produce a result inconsistent with the objective of the federal antitrust laws interpreted by the Supreme Court as excluding the business of baseball.", 316 F.Supp. at 279 (App. 109).

Nevertheless, Petitioner continues to argue that this Court in *Toolson* was inviting state regulation. Point I of this brief is a complete answer to that argument. Petitioner simply refuses to accept the fact that *Toolson, Shubert* and *Radovich* referred baseball's status exclusively to the more accomodative processes of Congress.

The reserve system has been recognized by Congress to represent the very fabric of the interstate business of baseball. To expose that reserve system to attack under state law would be to run directly contrary to the national policy which is so evident in the history of Congressional consideration of baseball.

In an effort to undermine the decisions of the courts below, Petitioner complains that neither the District Court nor the Court of Appeals made a particularized inquiry into state law. But Petitioner never gave either court assistance, for he failed to assert at any time which state's laws should apply and why; he merely generalized about state law in the abstract as counterpoint to his federal antitrust arguments. Despite this, both courts had before them a complete record of the baseball industry and the texts of numerous state antitrust laws. After considering the impact these laws would have on the industry before them, both courts concluded that state antitrust regulation was impermissible.

Finally, Petitioner attempts to avoid the dual rationale of the *Wisconsin* case and the opinions of both courts

below, by comparing baseball's intricate web of leagues, schedules, rules and regulations to the operations of a "door-to-door seller" and by implying that if baseball is exempt from the state antitrust laws then the self-interest of the peddler might also enable him to avoid state regulation. (Pet. Br., p. 37.) But this ignores the basis for, and the clear language of, this Court's opinion in *Southern Pacific* where the Court held that state regulation is permissible so long as it "is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation : . .", but not if "the need of national uniformity" requires that "regulation, if any, be prescribed by a single authority." 325 U. S. at 767.

Baseball has demonstrated its obvious need for uniform nationwide regulation and has shown that serious interference would result from fragmentary and conflicting state regulation. Recognition of this by the courts below, and their faithful application of the principles of *Southern Pacific,* can have no adverse impact on valid state regulatory measures, in the field of antitrust law or otherwise.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

Respectfully submitted,

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ADDENDUM A

United States Constitution, Article I, Section 8

The Congress shall have Power

* * * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

United States Constitution, Article VI, clause 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ADDENDUM B

Set forth below are those portions of the Uniform Player's Contract, Regulations included as a part thereof, and Major League Rules which constitute baseball's reserve system:

Uniform Player's Contract (Plaintiff's Ex. 3*):

The renewal option

"10. (a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.**

(b) The Club's right to renew this contract, as provided in sub-paragraph (a) of this paragraph 10, and

* The Uniform Player's Contract entered in evidence as Pl. Ex. 3 was substantially modified by the 1970 baseball collective bargaining agreement. (Def. Feeney Ex. N, App. 418-47.) Footnote references will therefore be made to indicate significant modifications.

** The maximum salary cut permissible under this paragraph has been reduced. A player's salary may be cut only 20% in any one year and 30% in any two consecutive years. (Def. Feeney Ex. N, App. 422.)

the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof."

Minimum salary requirements

"2. Notwithstanding the rate of payment stipulated above, the minimum rate of payment to the Player for each day of service on a Major League Club shall be at the rate of $10,000 per year; except, if a Player physically joins a Major League Club on or after September 1, he shall be paid during September at the rate of $8,500 per year for each day of service until he has accumulated a total of 60 days of Major League service, after which he shall be paid at the rate of $10,000 per year for each day of service with such Major League Club.*

Payment to the Player at the rate stipulated above shall be continued throughout any period in which a Player is required to attend a regularly scheduled military encampment of the Reserve of the Armed Forces or of the National Guard during the Club's playing season."

Requirement that player may play for only one club

"5. (a) The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games under the conditions prescribed in the Major League Rules. Major League Rule 18(b) is set forth on page 4 hereof."

Participation in other sports prohibited

"5. (b) The Player and the Club recognize and agree that the Player's participation in other sports

*The minimum salary has been increased as follows: for the 1970 season, $12,000, for the 1971 season, $12,750 and for the 1972 season, $13,500. (Def. Feeney Ex. N, App. 419.)

may impair or destroy his ability and skill as a baseball player. Accordingly the Player agrees that he will not engage in professional boxing or wrestling; and that, except with the written consent of the Club, he will not engage in any game or exhibition of football, basketball, hockey or other athletic sport."*

Assignment of player contract

"6. (a) The player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules.

(b) The amount stated in paragraph 2 hereof which is payable to the Player for the period stated in paragraph 1 hereof shall not be diminished by any such assignment, except for failure to report as provided in the next sub-paragraph (c).

(c) The Player shall report to the assignee Club promptly (as provided in the Regulations) upon receipt of written notice from the Club of the assignment of this contract. If the Player fails so to report, he shall not be entitled to any payment for the period from the date he receives written notice of assignment until he reports to the assignee Club."

Termination of player contract

"7. (b) The Club may terminate this contract upon written notice to the Player (but only after requesting and obtaining waivers of this contract from all other Major League Clubs) if the Player shall at any time:

(1) fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class

* This provision has been modified to prohibit only sports "involving a substantial risk of personal injury." (Def. Feeney Ex. N, App. 423.)

physical condition or to obey the Club's training rules; or

(2) fail, in the opinion of the Club's management, to exhibit sufficient skill or competitive ability to qualify or continue as a member of the Club's team; or

(3) fail, refuse or neglect to render his services hereunder or in any other manner materially breach this contract.

(c) If this contract is terminated by the Club by reason of the Player's failure to render his services hereunder due to disability resulting directly from injury sustained in the course and within the scope of his employment hereunder and written notice of such injury is given by the Player as provided in the Regulations on page 4 hereof, the Player shall be entitled to receive his full salary for the season in which the injury was sustained, less all workmen's compensation payments paid or payable by reason of said injury.

(d) If this contract is terminated by the Club during the training season, payment by the Club of the Player's board, lodging, and expense allowance during the training season to the date of termination and of the reasonable traveling expenses of the Player, including first-class jet air fare and meals en route to his home city, and the expert training and coaching provided by the Club to the Player during the training season shall be full payment to the Player.*

(e) If this contract is terminated by the Club during the playing season, then, except in the case provided for in sub-paragraph (c) of this paragraph 7, the Player shall be entitled to receive as full payment hereunder such portion of the amount stipu-

* The Club must now pay 30 days termination pay to a player terminated under subparagraph (b)(2) during the spring training season. (App. 498.)

lated in paragraph 2 hereof as the number of days of his actual employment in the Club's playing season bears to the total number of days in said season, provided, however, that if this contract is terminated under sub-paragraph (b)(2) of this paragraph 7 for failure to exhibit sufficient skill or competitive ability, the Player shall be entitled to an additional amount equal to thirty (30) days payment at the rate stipulated in paragraph 2 hereof and the reasonable traveling expenses of the Player including first-class jet air fare and meals en route to his home city.*

(f) If the Club proposes to terminate this contract in accordance with sub-paragraph (b) of this paragraph 7, the procedure shall be as follows:

(1) The Club shall request waivers from all other Major League Clubs. Such waiver request must state that it is for the purpose of terminating this contract and it may not be withdrawn.

(2) Upon receipt of the waiver request, any other Major League Club may claim assignment of this contract at a waiver price of $1.00, the priority of claims to be determined in accordance with the Major League Rules.

(3) If this contract is so claimed, the Club shall, promptly and before any assignment, notify the Player that it had requested waivers for the purpose of terminating this contract and that the contract had been claimed.

(4) Within 5 days after receipt of notice of such claim, the Player shall be entitled, by written notice to the Club, to terminate this contract on the date of his notice of termination. If the Player fails so to notify the Club, this contract shall be assigned to the claiming Club.

* The termination pay provided in subsection 7(e) has been increased from 30 days to 60 days for the 1970 season and, with respect to any terminations occurring on or after May 15 in the 1972 season and thereafter, the player shall be entitled to the full balance of salary payments due under his contract to the end of the season. (Def. Feeney Ex. N, App. 421; App. 498.)

(5) If the contract is not claimed, the Club shall promptly deliver written notice of termination to the Player at the expiration of the waiver period."

Incorporation of Major League Rules

"9. (a) The Club and the Player agree to accept, abide by and comply with all provisions of the Major League Agreement, the Major League Rules, the Rules or Regulations of the League of which the Club is a member, and the Professional Baseball Rules, in effect on the date of this Uniform Player's Contract, which are not inconsistent with the provisions of this contract or the provisions of any agreement between the Major League Clubs and the Major League Baseball Players Association, provided that the Club, together with the other Clubs of the American and National Leagues and the National Association, reserves the right to modify, supplement or repeal any provision of said Agreement, Rules and/or Regulations in a manner not inconsistent with this contract or the provisions of any then existing agreement between the twenty Clubs and the Major League Baseball Players Association. A copy of the Major League Agreement, the Major League Rules, the Rules or Regulations of the League of which the Club is a member, and the Professional Baseball Rules, as in effect on the date of this Contract has been delivered to the Player prior to execution of this Contract."

Regulation 5: Discipline

"For violation by the Player of any regulation or other provision of this contract, the Club may impose a reasonable fine and deduct the amount thereof from the Player's salary or may suspend the Player without salary for a period not exceeding thirty days, or both. Written notice of the fine or

suspension or both and the reasons therefore shall in every case be given to the Player."*

Regulation 7: Reporting on assignment

"In case of assignment of this contract the Player shall report promptly to the assignee club within 72 hours from the date he receives written notice from the Club of such assignment, if the Player is then not more than 1600 miles by most direct available railroad route from the assignee Club, plus an additional 24 hours for each additional 800 miles."

Major League Rules (Plaintiff's Ex. 6):

The no tampering rule—Rule 3(g)

"TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract or acceptance of terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement."

The reserve lists—Rule 4-A(a)

"On or before November 15 in each year, each Major League Club shall transmit to the Commissioner and to its League President a list of not exceeding forty

* Such discipline may now be submitted by the player to arbitration before a third-party arbitrator in accordance with the terms of the grievance procedure contained in the 1970 collective bargaining agreement. (Def. Feeney Ex. N, App. 422, 429-44.)

(40) active and eligible players, whom the club desires to reserve for the ensuing season; and also a list of all its players who have been promulgated as placed on the Military, Voluntarily Retired, Restricted, Disqualified, Suspended or Ineligible Lists; and players signed under Rule 4 who do not count in the club's under control limit. On or before November 30 the League President shall transmit all of said lists to the Secretary-Treasurer of the Executive Council, who shall thereupon promulgate same, and thereafter no player on any list shall be eligible to play for or negotiate with any other club until his contract has been assigned or he has been released."

The assignment rule—Rule 9

"A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.

The date of assignment shall be deemed to be the date upon which notice of assignment is delivered to the player.

After the date of such assignment all rights and obligations of the assignor clubs thereunder shall become the rights and obligations of the assignee club except as otherwise provided in Rule 4 and the assignee club shall be liable to the player for payments accruing from the date of assignment and shall not be liable (but the assignor club shall remain liable) for payments accrued prior to and including that date."

The rule requiring player contracts to be uniform —Rule 3(a)

"UNIFORM CONTRACT. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major

League Executive Council. No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, except with the written approval of the Commissioner. All contracts shall be in duplicate and the player shall retain a counterpart original. The making of any agreement between a club and a player not embodied in the contract shall subject both parties to discipline; and no such agreement, whether written or verbal, shall be recognized or enforced."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-32

CURTIS C. FLOOD, *Petitioner,*

v.

BOWIE K. KUHN, ET AL., *Respondents.*

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

A. Baseball's argument that it is too poor to comply with the antitrust laws is both irrelevant and ~~false~~ 1

B. The record does not support Baseball's claims regarding the indispensable role of the present reserve system, or the extent to which it has been "relied" upon by investors 3

C. The less restrictive practices in other sports do indeed illuminate the impermissibility of Baseball's unique system of restraint 5

D. Baseball's claim that petitioner did not adequately apprise the courts below of the basis for his state law claims is absurd 7

E. The so-called labor exemption has nothing to do with this case, which involves imposition by the club owners of a unique set of restraints both inside and outside the bargaining unit, and their enforcement by worldwide blacklist and group boycott 8

1. Baseball asks the Court to overrule *Radovich* . 9

2. The labor exemption does not apply 11

a. The reserve system is not "wages, hours, or other terms and conditions of employment". 11

b. Even if collectively agreed to, the reserve system is not exempt 13

c. The reserve system is not collectively agreed to 14

d. Baseball enforces its system by resort to a worldwide blacklist and group boycott 15

Conclusion 17

TABLE OF AUTHORITIES

CASES: Page

American League Baseball Club v. *Chase*, 86 Misc. 441, 149 N.Y.S. 6 (Sup. Ct. 1914) 7

Blake v. *Frick*, 20 Misc. 2d 520, 191 N.Y.S. 2d 177 (Sup. Ct.), app. dismissed, 9 App. Div. 2d 893, 199 N.Y.S. 2d 396 (1959) 8

Chevron Oil Co. v. *Huson*, — U.S. —, 30 L.Ed. 2d 296 (Dec. 6, 1971) 5

Cincinnati Exhibition Co. v. *Johnson*, 190 Ill. App. 650 (1914) 12

Denver Rockets v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Calif. 1971) 11

Fashion Originators' Guild v. *F.T.C.*, 312 U.S. 457 (1941) 2

Federal Baseball Club v. *National League*, 259 U.S. 200 (1922) 11

Haywood v. *National Basketball Association*, 401 U.S. 1204 (1971) (Douglas, J.) 11

Hodges v. *United States*, 203 U.S. 1 (1906) 17

Klor's, Inc. v. *Broadway-Hale Stores*, 359 U.S. 207 (1959) 17

Meat Cutters v. *Jewel Tea Co.*, 381 U.S. 676 (1965) .. 13, 14, 16

Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 13, 14, 16

Paramount Famous Lasky Corp. v. *United States*, 282 U.S. 30 (1930) 2

Pollock v. *Williams*, 322 U.S. 4 (1944) 17

Radiant Burners, Inc. v. *People's Gas Light & Coke Co.*, 364 U.S. 656 (1961) 16

Radovich v. *National Football League*, 352 U.S. 445 (1957) 9, 10, 11

Ramsey v. *Mine Workers*, 401 U.S. 302 (1971) 13, 14

Robertson v. *National Basketball Association*, 70 Civ. 1526 (S.D.N.Y. May 4, 1970) 10

Toolson v. *New York Yankees*, 345 U.S. 356 (1953) ... 3, 4, 5, 9, 10, 11

United States v. *General Motors*, 384 U.S. 127 (1966) 16

United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) 2

Page

MISCELLANEOUS AUTHORITIES CITED:

"Organized Baseball," H. Rep. No. 2002, Subcommittee on Study of Monopoly Power, House Committee on the Judiciary, 82d Cong., 2d Sess., May 27, 1952 ..... 3, 4, 9, 16

Statement by Robert R. Nathan for the N.B.A. and A.B.A. before Senate Subcommittee on Antitrust and Monopoly Legislation in support of S. 2373, Sept. 21, 1971, pp. 19-20 6

Red Smith, New York Times, Feb. 17, 1972 17

IN THE

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No. 71-32

CURTIS C. FLOOD, *Petitioner*,

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PETITIONER'S REPLY BRIEF

Petitioner believes it might be of use to the Court if he addresses several points raised by respondents, including their "economic" argument, their claim as to indispensability of the reserve system, the relevance of the situation in other professional team sports, the extent to which the courts below were informed regarding state law, and the inapplicability of the so-called labor exemption to this case.

A. Baseball's argument that it is too poor to comply with the antitrust laws is both irrelevant and false.

Respondents seek to escape application of the antitrust laws to Baseball by arguing that their industry is economically incapable of adjusting to changes in the reserve system. This Court has repeatedly declined

to give weight to such excuses for noncompliance with the antitrust laws.[1] And apart from the doubts the argument insinuates regarding the effectiveness of the reserve system in protecting Baseball from adversity, it is factually untrue.

Respondents represent that 13 of the 24 Major League clubs suffered "losses" in 1969; that in the aggregate the 24 clubs "showed total losses in the millions," and that in consequence the industry's ability to adjust to change is marginal. Resp. Brief p. 7. The facts are quite different. Baseball's own figures, supplied by its own accountant Arthur Anderson & Co. and admitted into evidence, reflect that between 1965 and 1969 the Major League clubs had aggregate operating income of $40 million, on revenues of $510 million. Even after $28 million in players' contracts was amortized, paper transactions with no effect upon actual cash flow and with substantial tax benefits to those high income individuals who own professional baseball teams, the clubs reported aggregate net income after taxes of $30 million. (Pl. Ex. 7)

In the year 1969, again by Baseball's own figures, the 24 clubs, including four new expansion franchises, reported operating income of $4.6 million, and aggregate net income of over $6 million before amortization of players' contracts. Excepting the four expansion teams, which were permitted to amortize much of the $30 million paid to gain entry into Major League Baseball, the established clubs showed aggregate 1969 net

[1] See, e.g., *Paramount Famous Lasky Corp.* v. *United States*, 282 U.S. 30 (1930), (rejecting claims based upon the "special" needs of the motion picture industry), *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22 (1940); *Fashion Originators' Guild* v. *F.T.C.*, 312 U.S. 457, 467 (1941).

income of $3.5 million, after taxes *and* amortization of players' contracts. (Pl. Ex. 7)

B. The record does not support Baseball's claims regarding the indispensable role of the present reserve system, or the extent to which it has been "relied" upon by investors.

Respondents contend that only the reserve system saved Baseball from the chaotic conditions of a century ago, that in its present form it is the indispensable cornerstone of the sport, and that investors have relied upon whatever immunity was granted to the reserve system by *Toolson*. Each of these assertions rests on little more than the self-serving testimony of the club owners and their hired officials, and each withered under cross-examination.

The assertion that only the reserve system saved Baseball from the chaos of a century ago, and that its modification would bring back the "old days," rests largely on respondent Kuhn's testimony and upon a gross misreading of the Celler Report.[2] Kuhn's position, it turned out, rested on his incredible assumption that the experience of teams which nearly a century ago each grossed less than $40,000 would be a "reliable guide" to how today's multi-million dollar franchises would respond in the absence of today's restrictive reserve system. (A. 277) The authors of the Celler Report did indeed conclude that the various forms of the reserve system had been useful, and that some arrangement to preserve a measure of player continuity was probably necessary. But they also unearthed great and abiding abuses, and declined to recommend

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[2] "Organized Baseball," H. Rep. No. 2002, Subcommittee on Study of Monopoly Power, House Committee on the Judiciary, May 27, 1952 [hereinafter cited as "Celler Report"].

for Baseball a legislative grant of immunity from the antitrust laws precisely because they thought the courts had a vital role to play in "[differentiating] the unreasonable features of baseball's rules and regulations from those which are reasonable and necessary." Celler Report, p. 232.

The assertion that the present reserve system is the essential cornerstone of modern Baseball also rests on little more than self-serving declarations. Even respondent Kuhn had to concede that changes in the reserve system would not necessarily be detrimental to Baseball, and that he could not evaluate the impact of such changes until he knew what they were. (A. 273) Club president McHale testified to the same effect. (A. 303)

Finally, a parade of club owners testified that they had "relied" on *Toolson* when they invested in professional baseball teams. This was, of course, largely beside the point; the prior decisions of this Court are not a proper basis for wagering that it will adhere to a conception of interstate commerce that it rejected years ago. Moreover, the record shows that each investor anticipated that Congress might at any time strip away Baseball's antitrust immunity, and that none had relied upon any immunity from state regulation. Additionally, the purchaser of the Kansas City franchise admitted he had been told by his attorney that the Major League Players Association might bring about changes in the system. See Pet. Brief pp. 24-25. Nevertheless, they invested. Indeed, two of these investors simultaneously made large investments in professional football teams they knew enjoyed no such antitrust immunity. (A. 295, 305) Finally, experienced baseball men like Bill Veeck and Hank

Greenberg testified that they regarded baseball as an attractive investment even were the reserve system to be changed substantially. (A. 384-397, 180-181)

The "quality" of the alleged "reliance interest" developed at trial is illustrated by John J. McHale's testimony. He swore that were it not for *Toolson*, he would not have invested $100,000 (Canadian) and assumed a contingent liability of only $25,000 to purchase a 10 per cent interest in a new Montreal team with an opening net worth of $10.8 million (Canadian), (A. 301-302), all of whose working capital came from advance ticket sales (R. 1329), and which team presumably pays him a substantial salary as club president. Such is the stuff of which "reliance" is made.[3]

C. The less restrictive practices in other sports do indeed illuminate the impermissibility of Baseball's unique system of restraint.

Respondents contend, as they did at trial, that the reserve systems in other professional sports are not really less restrictive than Baseball's, and that those other sports are not analogous. The record demonstrates that professionals in no other sport are so restricted as baseball players. A football player may choose between the National Football League and a career in Canadian football. A basketball player may choose between the NBA and the ABA. And a new

[3] The Court's decision in *Chevron Oil Co.* v. *Huson*, — U.S. —, 30 L.Ed.2d 296, 305-07 (Dec. 6, 1971), ought to put an end to any doubts that prospective application (except as to plaintiff) of a non-criminal decision overruling controlling precedent is available to vindicate any legitimate "reliance interest" in that precedent.

[4] Petitioner takes no position on whether any of these other situations comply with or violate federal or state antitrust laws.

league has been created to provide competitive opportunities for professional hockey players. Only in professional baseball do a small concert of businessmen impose a worldwide boycott on every employment alternative.

Players in other sports do in fact play out their options and sign with other teams in the same league, or jump to competing leagues. Pet. Brief p. 27. And in spite of the plea that a reserve system like Baseball's is essential to preserve professional team sports, the professional basketball owners have proposed a plan, set out as Appendix B to petitioner's brief, which is *substantially* less restrictive than Baseball's. It is no answer to say that Baseball is "different" because basketball and football, unlike baseball (Pete Broberg?), recruit players of already matured skills and preexisting reputation. Established college basketball and football stars receive bonuses and salaries far in excess of that paid by Baseball to unknown young players. Compare petitioner's starting salary of $4,000, and the median salary of all major league baseball players in August 1969 of only $20,000 (A. 360), with the average starting salary for *rookies* in the N.B.A. in 1970-1971 of $46,000. The top twelve *rookies* in the N.B.A. averaged $114,000. Statement by Robert R. Nathan for the N.B.A. and the A.B.A. before the Senate Subcommittee on Antitrust and Monopoly Legislation, in support of S. 2373, Sept. 21, 1971, pp. 19-20. Moreover, so long as Baseball's club owners write off their investments in "player development" [5]

[5] Baseball's "player development" figures are more financial legerdemain. Baseball arrives at the alleged cost of "developing" a major league player by attributing all expenditures on all the thousands of players in professional baseball, all the administrative costs of operating 21 minor leagues and their 155 teams, and all

in the year incurred, or amortize them over a 3 to 5 year period, this is persuasive evidence, indeed an admission, that the restraints upon such players ought not to be for life.

D. Baseball's claim that petitioner did not adequately apprise the courts below of the basis for his state law claims is absurd.

Baseball argues that petitioner was in some way estopped from invoking this Court's rule that state law not be preempted without a "particularized inquiry" because he gave the courts below insufficient "assistance" in identifying and describing the applicable state laws. Resp. Brief, p. 58. Once again, the facts are precisely to the contrary. Paragraph 28 of petitioner's complaint identified the laws of New York and California, *inter alia,* as applicable, and cited specific statutes. (A. 13-14) In his briefs to the trial court, both before and after trial, and to the Court of Appeals, petitioner discussed the law of 14 states and included an exhaustive state law appendix which not only recited the applicable statutes but described and analyzed the case law, including the state cases which dealt directly with Baseball's reserve system. See, e.g., *American League Baseball Club* v. *Chase,* 86 Misc. 441, 465, 149 N.Y.S. 6, 19 (1914) (reserve clause vio-

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scouting expenses, solely to the few players who reach the Major Leagues. (R. 1312) Allocating all of these costs among this small minority allegedly yields a figure of $316,000 per player. Resp. Brief p. 10. This technique obviously disregards the fact that minor league players, their teams and the scouting system have an economic function and justification wholly independent of the goal of producing major league ball players. Over 10 million persons saw minor league baseball in 1969. (Def. Feeney's Ex. I) As recently as 1949, the minor leagues played to nearly 42 million persons, and until recently were operated at a *profit* by the majors. Celler Report, at 107-108.

lates common law and constitutes "involuntary servitude"); *Blake* v. *Frick*, 20 Misc. 2d 520, 524, 191 N.Y.S. 2d 177, 181 (Sup.Ct.), app. dismissed, 9 App. Div. 2d 893, 199 N.Y.S. 2d 396 (1959) (challenge to the Uniform Players' Contract states claim under New York state antitrust law). If the courts below failed to make the necessary "particularized inquiry" into the impact of any state's law before deeming it preempted, and they did so fail, it was not for want of "assistance."

E. The so-called labor exemption has nothing to do with this case, which involves imposition by the club owners of a unique set of restraints both inside and outside the bargaining unit, and their enforcement by worldwide blacklist and group boycott.

Petitioner has previously observed that for half a century Baseball has sought to resist regulation by every forum to which it has been brought by asserting that it was always "some other forum" which alone had jurisdiction. Petitioner pointed out, for example, that Baseball formally represented to this Court in 1922 and again in 1953 that it should declare federal antitrust laws inapplicable to Baseball because state and local laws were "entirely competent to reach and deal with any evil in the sport," to state courts that only federal regulation was permissible, and to Congress that legislation to correct the system's obvious abuses was unnecessary because "the legality of the reserve clause will be tested" in the courts. Pet. Brief p. 39. Respondents protest this characterization of their tactics; they insist that they never took such inconsistent positions. Resp. Brief p. 22. But they do not deny or explain either the examples of their own representations collected in petitioner's brief or respondent Kuhn's admission under cross-examination of

the accuracy of the Celler Report's account of Baseball's representation to Congress.[6] (A. 273)

Unable to persuade the National Labor Relations Board that professional baseball is immune from the labor laws, and afraid that *Toolson* no longer provides reliable insulation from the antitrust laws, Baseball once again seeks to persuade the forum to which it has been brought that it is someone else—this time the Labor Board—that alone has jurisdiction in the matter. It should not be permitted to succeed.

The so-called labor exemption issue was not passed upon below, nor was it principally relied upon in oral argument in the Court of Appeals. But Baseball seeks a ruling that the labor laws exempt from antitrust scrutiny a professional team sport's arrangements for eliminating competition in the recruitment of personnel. Its thesis is that such arrangements are "wages, hours, and other terms and conditions of employment," therefore mandatory subjects of bargaining, and in consequence exempt from the Sherman Act. The Court should not accept the thesis, for its consequences are intolerable, and the thesis itself does not survive analysis.

1. *Baseball asks the Court to overrule Radovich:* What Baseball asks—for there is no way to confine its thesis to professional baseball—is that the Court re-

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[6] The Celler Report, in which respondents purport to find legislative sanction for the reserve system (Resp. Brief pp. 8, 9), concludes at p. 232 that "Organized Baseball, represented by eminent counsel [respondents' present counsel, including then attorney Kuhn], has assured the subcommittee that the legality of the reserve clause will be tested by the rule of reason. . . . Legislation is not necessary until the reasonableness of the reserve rules has been tested by the courts."

view not *Toolson* v. *New York Yankees,* 345 U.S. 356 (1953), but *Radovich* v. *National Football League,* 352 U.S. 445 (1957), where the identical labor exemption argument was advanced by professional football[7] and summarily rejected by this Court as "lacking in merit." 352 U.S. at 454. What Baseball asks is that the Court eliminate the conceded anomaly of Baseball's unique position, not by subjecting Baseball to the same antitrust regulation which has been applied to other professional team sports without adverse effect and without the harassment which Baseball purports to fear, but rather by extending the same dubious immunity to professional football, basketball, hockey and soccer. The Court is asked to scrap the entire structure of federal antitrust regulation which has grown up around professional team sports—except baseball—during the past fifteen years, and under whose aegis owners have been induced gradually to ameliorate unreasonable restraints upon player freedom.[8] The Court is asked, in effect, to overturn *Robertson* v. *National Basketball Association,* 70 Civ. 1526 (S.D.N.Y. May 4, 1970), where the two professional basketball leagues

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[7] See Brief for Resp. in No. 94, 1956 Term, pp. 59-63. Football argued unsuccessfully, and in language identical to that now advanced by Baseball, that "the allegations of the complaint reveal nothing more than a controversy between the employee and his employer and their association concerning terms and conditions of employment." *Id.,* at 60.

[8] Respondents stress the desirability of having the parties to the collective bargaining process, not the courts, work out necessary changes in the reserve system. Resp. Brief pp. 38-39. But experience in the other professional team sports shows that such negotiations are more fruitful when conducted within the parameters of the law, when bargaining is confined to what the parties believe to be legal alternatives, and when the owners are unable to hide behind an "immunity."

were enjoined from adopting a common draft until they obtain legislative permission, and all other lower court decisions which have had the salutary effect of domesticating professional team sports. See, e.g., *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Calif. 1971); Cf. *Haywood* v. *National Basketball Association*, 401 U.S. 1204 (1971) (Douglas, J.). Can it be that all the commentators are wrong—that it is not *Federal Baseball Club* and *Toolson* which were the mistakes, but *Radovich*?

2. *The labor exemption does not apply:* Analysis of Baseball's contention exposes its untenability. *First,* the lifetime, worldwide restraint unilaterally imposed by club owners upon every professional baseball player's freedom cannot be subsumed under the rubric "wages, hours, and other terms and conditions of employment," for it is too far outside the realm of labor relations experience, and is not the kind of restraint contemplated by the labor laws. *Second,* the decisions of this Court do not insulate from antitrust scrutiny anticompetitive restraints of the type involved in this case, even were they to be embodied in a collective bargaining agreement. *Third,* here they are not collectively agreed to. *Fourth,* the invalidity of the restraints is demonstrated by the fact that the club owners implement them not by legal techniques for enforcing collective bargaining contracts, but by a separate agreement among themselves, long antedating the organization of the Players Association and never changed to this day, to employ a worldwide threat of boycott and blacklist.

a. *The reserve system is not "wages, hours, or other terms and conditions of employment":* There is no authority for the proposition that a labor union can

be compelled to bargain in good faith over an employer's proposal that its members indenture themselves to him or his assignee for life, in return for nothing more than the employer's contractual obligation to pay thirty days' wages upon dismissal. This is exactly what the reserve system does.[9]

Examples come readily to mind. Could United States Steel, for example, compel the Steelworkers to negotiate over a proposal that open hearth men be forbidden to seek employment with any other steel company, anywhere in the world, without United States Steel's permission, in return for so insubstantial a reciprocal obligation? Could IBM obligate its engineers to negotiate over a proposal that they forego—for life—the alternative of employment with any other employer of engineers anywhere in the world, in return for the right only to receive thirty days' pay upon dismissal? Would the Labor Board hold refusal by a union to negotiate over such proposals to be an unfair labor practice? And what court could enforce such contracts, whether individually or collectively negotiated, against the long line of decisions defining the reasonableness of restraints? See, e.g., *Cincinnati Exhibition Co.* v. *Johnson,* 190 Ill. App. 650 (1914) (refusing to enforce a baseball contract for lack of mutuality of

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[9] Section 7(e) of the Uniform Players' Contract, in effect when this suit was brought, provided 30 days' termination pay if a player is released during the season, plus travel expenses home. (A. 27). In 1970, termination pay was increased to 60 days, and next season a player will be entitled to the balance of the season's salary if released after May 15. (A. 421, 498) The 1970 agreement also provides, for the first time, that a major league player may have a representative attend contract bargaining sessions with him. There remains no right to such assistance when a ballplayer, who may be a non-English speaking teenager, signs his initial contract—which subjects him to the reserve system for life.

obligation). Yet Baseball contends that the reserve system, a lifetime indenture—no other words describe it—enforced by worldwide blacklist and boycott, is nothing more than "wages, hours, or other terms and conditions of employment," and therefore a mandatory subject of collective bargaining. As this Court recently observed, "there are limits to what a union or employer may offer or extract [even] in the name of wages." *Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965).

b. *Even if collectively agreed to, the reserve system is not exempt:* However the present system is defined, it is not insulated from antitrust accountability. This Court has held that *even* a labor organization, the principal intended beneficiary of the so-called labor exemption, may not escape antitrust liability when it acts, not unilaterally and in the sole interest of its own members, but in concert with employers "to prescribe labor standards outside the bargaining unit." And this is so even when the issue is so central to bargaining as wages. *Mine Workers* v. *Pennington*, 381 U.S. at 668. Compare *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). See *Ramsey* v. *Mine Workers*, 401 U.S. 302, 307 (1971). Respondents seek not only to avoid but to obscure the thrust of these decisions by erroneously suggesting that petitioner would have them apply only to employers. They overlook the fact that the entire Court recognized in *Pennington* and *Meat Cutters* that the so-called labor exemption applies to unions and employers alike.

The separate opinion on which respondents focus did express the view that "collective bargaining activity on mandatory subjects of bargaining" is exempt from antitrust regulation, without regard to whether

the union conduct invdlved is "unilateral." *Meat Cutters* v. *Jewel Tea*, 381 U.S. at 732 (concurring opinion). But the author of that opinion agreed with the majority that agreements between unions and nonlabor groups on hard-core restraints like "price-fixing and market allocation" were not exempt. 381 U.S. at 733. And there is no support in any of the opinions filed in *Meat Cutters* for Baseball's essential, if tacit, contention that unilateral, hard-core anticompetitive activity by employers acting alone—the present case—is somehow exempt from antitrust regulation.

c. *The reserve system is not collectively agreed to:* This case is in fact much clearer than *Pennington*, *Meat Cutters* or *Ramsey*, for petitioner does not challenge the fruits of collective bargaining activity. He seeks relief from a scheme—the reserve system—which Baseball admits has been in existence for nearly a century, and which the trial court expressly found was "created and imposed by the club owners long before the arrival of collective bargaining." (A. 108) In short, the reserve system is *not* collectively agreed to.[10] The players' representatives have consistently asserted that the system, as constituted, is illegal and therefore one in which they cannot acquiesce—both on the merits and for fear of incurring antitrust liability. See Statement of Policy, July 28, 1967 (Def. Feeney's Ex. O, A. 447, 453), and the testimony of Marvin Miller, (A. 371-372). After pre-trial argument, the court found that the reserve system was not incorporated in the

[10] Under *Pennington* the only consequence of accepting Respondents' claim that the Major League Players' Association is implicated in the scheme would be to make the Association a potential defendant. There would be no diminution in the club owners' joint and several liability.

initial collective bargaining agreement executed in 1968 and in effect when this suit was brought. (A. 75 n. 51) Moreover, Baseball and the Players Association have agreed in writing that the new 1970 Basic Agreement, which like its predecessor adopts the Uniform Players' Contract, does not incorporate the reserve system. See Def. Feeney's Ex. N. (A. 428)

Until late in 1969—a full year *after* execution of the 1968 agreement—it was Baseball's position that the reserve system was not a mandatory subject of bargaining. See the testimony of Baseball's labor negotiator, John J. Gaherin. (A. 503) Even thereafter Baseball has made no concessions, advanced no proposals, and refused to consider terminating the system's grip even when a player reaches the unsprightly age of 65. See Pet. Brief at p. 43. The real position of the owners, despite their new-found affection for collective bargaining and the labor exemption, is that change can only come at the hands of Congress. What room does that position leave for meaningful bargaining?

d. *Baseball enforces its system by resort to a worldwide blacklist and group boycott:* Finally, there is nothing in the 1968 or 1970 collective bargaining agreements, or in any of the proposals advanced by the Players Association and rejected by the club owners, to implicate the Association in the long-standing concert among Major League club owners to boycott any of their number, or any minor league or Japanese or Latin American club owner, employing a blacklisted player—that is, one who signed a contract to play for a Major League club and has not been given his freedom.

The very existence of this unlawful enforcement technique, which imposes the reserve system far beyond the bargaining unit, reflects the club owners' judgment that the reserve system is not collectively agreed to and cannot be enforced by conventional legal remedies. Even if we were to assume, for purposes of argument, that the Major League club owners and the Major League Baseball Players Association could lawfully agree that players are to negotiate only with present employers or their assignees,[11] *Meat Cutters* and *Pennington* would not permit the owners, either alone or in concert with the players, to agree to implement and enforce these restraints by resort to a blacklist of players or group boycott of one another, or of other potential employers. American automobile manufacturers may, for example, jointly fashion a common position with respect to issues arising in labor negotiations. But would anyone suggest that they may, with impunity under the antitrust laws, agree to blacklist employees on an industry-wide basis, or refuse to supply parts or goods or services to any participating manufacturer who fails to abide by its agreement, or to any foreign manufacturer who takes a different position? Such techniques are *per se* violations of the antitrust laws, whatever their purported excuse. *United States* v. *General Motors,* 384 U.S. 127 (1966); *Radiant Burners,*

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[11] This assumption is only for purposes of argument. In *Meat Cutters,* 381 U.S. at 693, Mr. Justice White noted that a collective bargaining agreement whose purpose was "to protect one group of employers from competition by another . . . is conduct that is not exempt from the Sherman Act." But the Celler Report found that one of the historic functions of Baseball's reserve system has been to serve "as a war measure to combat competition and protect organized baseball's monopoly position." Celler Report, p. 221.

Inc. v. *People's Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959).

CONCLUSION

The reserve clause is an indentured servitude that works upon all professional baseball players through a worldwide blacklist and group boycott. Until this Court brings it within the purposes of the Thirteenth Amendment, which freed Americans from bondage,[12] and the Sherman Act, the charter of our economic liberties, it will continue to be a blight upon our national sport.

What happened two years ago to petitioner now threatens another baseball star. Vida Blue of the Oakland Athletics was the single biggest gate attraction in the American League last year, and the winner of both the League's "Most Valuable Player Award" and the Cy Young Award. When he tried this year to raise his salary from $14,750 to the salary level of comparable players, the man who "reserves" him refused to offer more than $50,000. Indeed, his owner coupled the refusal with a threat only a baseball club owner could make: "I won't trade him and I won't sell him. Either he accepts what we have offered or he's through in baseball."[13]

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[12] The petitioner has from the outset asserted that the reserve clause constitutes involuntary servitude in violation of the Thirteenth Amendment. He does not abandon that argument. This Court has held that it is involuntary servitude to force a man to work for an employer. See, *Pollock* v. *Williams*, 322 U.S. 4 (1944), *Hodges* v. *United States*, 203 U.S. 1 (1906). Petitioner contends that it is involuntary servitude, similarly, to prevent a man from working for someone else.

[13] See Red Smith, quoting Charley Finley, owner of the Oakland Athletics, N. Y. Times, February 17, 1972.

It is time to abolish the anomaly that prevents the most skilled of their profession from offering their skills in a reasonably free market. The Court should reverse the decision below and remand for proceedings not inconsistent with its decision.

Respectfully submitted,

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FLOOD *v.* KUHN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 71–32. Argued March 20, 1972—Decided June 19, 1972

Petitioner, a professional baseball player "traded" to another club without his previous knowledge or consent, brought this antitrust suit after being refused the right to make his own contract with another major league team, which is not permitted under the reserve system. The District Court rendered judgment in favor of respondents, and the Court of Appeals affirmed. *Held:* The long-standing exemption of professional baseball from the antitrust laws, *Federal Baseball Club* v. *National League*, 259 U. S. 200 (1922); *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), is an established aberration, in the light of the Court's holding that other interstate professional sports are not similarly exempt, but one in which Congress has acquiesced, and that is entitled to the benefit of *stare decisis*. Removal of the resultant inconsistency at this late date is a matter for legislative, not judicial, resolution. Pp. 269–285.

443 F. 2d 264, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which STEWART and REHNQUIST, JJ., joined, and in all but Part I of which BURGER, C. J., and WHITE, J., joined. BURGER, C. J., filed a concurring opinion, *post*, p. 285. DOUGLAS, J., *post*, p. 286, and MARSHALL, J., *post*, p. 288, filed dissenting opinions, in which BRENNAN, J., joined. POWELL, J., took no part in the consideration or decision of the case.

Arthur J. Goldberg argued the cause for petitioner. With him on the briefs was *Jay H. Topkis*.

Paul A. Porter argued the cause for respondent Kuhn. *Louis F. Hoynes, Jr.*, argued the cause for respondents Feeney, President of National League of Professional Baseball Clubs, et al. With them on the brief were *Mark F. Hughes, Alexander H. Hadden, James P. Garner, Warren Daane,* and *Jerome I. Chapman.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

For the third time in 50 years the Court is asked specifically to rule that professional baseball's reserve system is within the reach of the federal antitrust laws.[1]

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[1] The reserve system, publicly introduced into baseball contracts in 1887, see *Metropolitan Exhibition Co.* v. *Ewing*, 42 F. 198, 202–204 (CC SDNY 1890), centers in the uniformity of player contracts; the confinement of the player to the club that has him under the contract; the assignability of the player's contract; and the ability of the club annually to renew the contract unilaterally, subject to a stated salary minimum. Thus

A. Rule 3 of the Major League Rules provides in part:

"(a) UNIFORM CONTRACT. To preserve morale and to produce the similarity of conditions necessary to keen competition, the contracts between all clubs and their players in the Major Leagues shall be in a single form which shall be prescribed by the Major League Executive Council. No club shall make a contract different from the uniform contract or a contract containing a non-reserve clause, except with the written approval of the Commissioner. . . .

"(g) TAMPERING. To preserve discipline and competition, and to prevent the enticement of players, coaches, managers and umpires, there shall be no negotiations or dealings respecting employment, either present or prospective, between any player, coach or manager and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved, or which has the player on its Negotiation List, or between any umpire and any league other than the league with which he is under contract or acceptance of terms, unless the club or league with which he is connected shall have, in writing, expressly authorized such negotiations or dealings prior to their commencement."

B. Rule 9 of the Major League Rules provides in part:

"(a) NOTICE. A club may assign to another club an existing contract with a player. The player, upon receipt of written notice of such assignment, is by his contract bound to serve the assignee.

"After the date of such assignment all rights and obligations of the

Collateral issues of state law and of federal labor policy are also advanced.

I

The Game

It is a century and a quarter since the New York Nine defeated the Knickerbockers 23 to 1 on Hoboken's

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assignor clubs thereunder shall become the rights and obligations of the assignee club . . . ."

C. Rules 3 and 9 of the Professional Baseball Rules contain provisions parallel to those just quoted.

D. The Uniform Player's Contract provides in part:

"4. (a) . . . The Player agrees that, in addition to other remedies, the Club shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by the Player, including, among others, the right to enjoin the Player from playing baseball for any other person or organization during the term of this contract."

"5. (a). The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club, except that the Player may participate in post-season games under the conditions prescribed in the Major League Rules. . . ."

"6. (a) The Player agrees that this contract may be assigned by the Club (and reassigned by any assignee Club) to any other Club in accordance with the Major League Rules and the Professional Baseball Rules."

"10. (a) On or before January 15 (or if a Sunday, then the next preceding business day) of the year next following the last playing season covered by this contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said January 15, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player at said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the club shall fix in said notice; provided, however, that said amount, if fixed by

Elysian Fields June 19, 1846, with Alexander Jay Cartwright as the instigator and the umpire. The teams were amateur, but the contest marked a significant date in baseball's beginnings. That early game led ultimately to the development of professional baseball and its tightly organized structure.

The Cincinnati Red Stockings came into existence in 1869 upon an outpouring of local pride. With only one Cincinnatian on the payroll, this professional team traveled over 11,000 miles that summer, winning 56 games and tying one. Shortly thereafter, on St. Patrick's Day in 1871, the National Association of Professional Baseball Players was founded and the professional league was born.

The ensuing colorful days are well known. The ardent follower and the student of baseball know of General Abner Doubleday; the formation of the National League in 1876; Chicago's supremacy in the first year's competition under the leadership of Al Spalding and with Cap Anson at third base; the formation of the American Association and then of the Union Association in the 1880's; the introduction of Sunday baseball; interleague warfare with cut-rate admission prices and player raiding; the development of the reserve "clause"; the emergence in 1885 of the Brotherhood of Professional Ball Players, and in 1890 of the Players League; the appearance of the American League, or "junior circuit," in 1901, rising from the minor Western Association; the first World

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a Major League Club, shall be an amount payable at a rate not less than 80% of the rate stipulated for the preceding year.

"(b) The Club's right to renew this contract, as provided in subparagraph (a) of this paragraph 10, and the promise of the Player not to play otherwise than with the Club have been taken into consideration in determining the amount payable under paragraph 2 hereof."

Series in 1903, disruption in 1904, and the Series' resumption in 1905; the short-lived Federal League on the majors' scene during World War I years; the troublesome and discouraging episode of the 1919 Series; the home run ball; the shifting of franchises; the expansion of the leagues; the installation in 1965 of the major league draft of potential new players; and the formation of the Major League Baseball Players Association in 1966.[2]

Then there are the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided tinder for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season: Ty Cobb, Babe Ruth, Tris Speaker, Walter Johnson, Henry Chadwick, Eddie Collins, Lou Gehrig, Grover Cleveland Alexander, Rogers Hornsby, Harry Hooper, Goose Goslin, Jackie Robinson, Honus Wagner, Joe McCarthy, John McGraw, Deacon Phillippe, Rube Marquard, Christy Mathewson, Tommy Leach, Big Ed Delahanty, Davy Jones, Germany Schaefer, King Kelly, Big Dan Brouthers, Wahoo Sam Crawford, Wee Willie Keeler, Big Ed Walsh, Jimmy Austin, Fred Snodgrass, Satchel Paige, Hugh Jennings, Fred Merkle, Iron Man McGinnity, Three-Finger Brown, Harry and Stan Coveleski, Connie Mack, Al Bridwell, Red Ruffing, Amos Rusie, Cy Young, Smokey Joe Wood, Chief Meyers, Chief Bender, Bill Klem, Hans Lobert, Johnny Evers, Joe Tinker, Roy Campanella, Miller Huggins, Rube Bressler, Dazzy Vance, Edd Roush, Bill Wambsganss, Clark Griffith, Branch Rickey, Frank Chance, Cap Anson,

[2] See generally The Baseball Encyclopedia (1969); L. Ritter, The Glory of Their Times (1966); 1 & 2 H. Seymour, Baseball (1960, 1971); 1 & 2 D. Voigt, American Baseball (1966, 1970).

Nap Lajoie, Sad Sam Jones, Bob O'Farrell, Lefty O'Doul, Bobby Veach, Willie Kamm, Heinie Groh, Lloyd and Paul Waner, Stuffy McInnis, Charles Comiskey, Roger Bresnahan, Bill Dickey, Zack Wheat, George Sisler, Charlie Gehringer, Eppa Rixey, Harry Heilmann, Fred Clarke, Dizzy Dean, Hank Greenberg, Pie Traynor, Rube Waddell, Bill Terry, Carl Hubbell, Old Hoss Radbourne, Moe Berg, Rabbit Maranville, Jimmie Foxx, Lefty Grove.[3] The list seems endless.

And one recalls the appropriate reference to the "World Serious," attributed to Ring Lardner, Sr.; Ernest L. Thayer's "Casey at the Bat";[4] the ring of "Tinker to

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[3] These are names only from earlier years. By mentioning some, one risks unintended omission of others equally celebrated.

[4] Millions have known and enjoyed baseball. One writer knowledgeable in the field of sports almost assumed that everyone did until, one day, he discovered otherwise:

"I knew a cove who'd never heard of Washington and Lee,
Of Caesar and Napoleon from the ancient jamboree,
But, bli'me, there are queerer things than anything like that,
For here's a cove who never heard of 'Casey at the Bat'!

"Ten million never heard of Keats, or Shelley, Burns or Poe;
But they know 'the air was shattered by the force of Casey's blow';
They never heard of Shakespeare, nor of Dickens, like as not,
But they know the somber drama from old Mudville's haunted lot.

"He never heard of Casey! Am I dreaming? Is it true?
Is fame but windblown ashes when the summer day is through?
Does greatness fade so quickly and is grandeur doomed to die
That bloomed in early morning, ere the dusk rides down the sky?"

"He Never Heard of Casey" Grantland Rice, The Sportlight, New York Herald Tribune, June 1, 1926, p. 23.

Evers to Chance"; [5] and all the other happenings, habits, and superstitions about and around baseball that made it the "national pastime" or, depending upon the point of view, "the great American tragedy." [6]

II

The Petitioner

The petitioner, Curtis Charles Flood, born in 1938, began his major league career in 1956 when he signed a contract with the Cincinnati Reds for a salary of $4,000 for the season. He had no attorney or agent to advise him on that occasion. He was traded to the St. Louis Cardinals before the 1958 season. Flood rose to fame as a center fielder with the Cardinals during the years 1958–1969. In those 12 seasons he compiled a batting average of .293. His best offensive season was 1967 when he achieved .335. He was .301 or better in six of the 12 St. Louis years. He participated in the 1964, 1967, and 1968 World Series. He played errorless ball in the field in 1966, and once enjoyed 223 consecutive errorless games. Flood has received seven Golden Glove Awards. He was co-captain of his team from 1965–1969. He ranks among the 10 major league outfielders possessing the highest lifetime fielding averages.

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[5] "These are the saddest of possible words,
'Tinker to Evers to Chance.'
Trio of bear cubs, and fleeter than birds,
'Tinker to Evers to Chance.'
Ruthlessly pricking our gonfalon bubble,
Making a Giant hit into a double—
Words that are weighty with nothing but trouble:
'Tinker to Evers to Chance.'"
Franklin Pierce Adams, Baseball's Sad Lexicon.

[6] George Bernard Shaw, The Sporting News, May 27, 1943, p. 15, col. 4.

Flood's St. Louis compensation for the years shown was:

1961	$13,500 (including a bonus for signing)
1962	$16,000
1963	$17,500
1964	$23,000
1965	$35,000
1966	$45,000
1967	$50,000
1968	$72,500
1969	$90,000

These figures do not include any so-called fringe benefits or World Series shares.

But at the age of 31, in October 1969, Flood was traded to the Philadelphia Phillies of the National League in a multi-player transaction. He was not consulted about the trade. He was informed by telephone and received formal notice only after the deal had been consummated. In December he complained to the Commissioner of Baseball and asked that he be made a free agent and be placed at liberty to strike his own bargain with any other major league team. His request was denied.

Flood then instituted this antitrust suit [7] in January 1970 in federal court for the Southern District of New York. The defendants (although not all were named in each cause of action) were the Commissioner of Baseball, the presidents of the two major leagues, and the 24 major league clubs. In general, the complaint charged violations of the federal antitrust laws and civil rights statutes, violation of state statutes and the common law, and the imposition of a form of peonage and involuntary

[7] Concededly supported by the Major League Baseball Players Association, the players' collective-bargaining representative. Tr. of Oral Arg. 12.

servitude contrary to the Thirteenth Amendment and 42 U. S. C. § 1994, 18 U. S. C. § 1581, and 29 U. S. C. §§ 102 and 103. Petitioner sought declaratory and injunctive relief and treble damages.

Flood declined to play for Philadelphia in 1970, despite a $100,000 salary offer, and he sat out the year. After the season was concluded, Philadelphia sold its rights to Flood to the Washington Senators. Washington and the petitioner were able to come to terms for 1971 at a salary of $110,000.[8] Flood started the season but, apparently because he was dissatisfied with his performance, he left the Washington club on April 27, early in the campaign. He has not played baseball since then.

III

The Present Litigation

Judge Cooper, in a detailed opinion, first denied a preliminary injunction, 309 F. Supp. 793 (SDNY 1970), observing on the way:

> "Baseball has been the national pastime for over one hundred years and enjoys a unique place in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young.
>
> "Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to

[8] The parties agreed that Flood's participating in baseball in 1971 would be without prejudice to his case.

> most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there." 309 F. Supp., at 797.

Flood's application for an early trial was granted. The court next deferred until trial its decision on the defendants' motions to dismiss the primary causes of action, but granted a defense motion for summary judgment on an additional cause of action. 312 F. Supp. 404 (SDNY 1970).

Trial to the court took place in May and June 1970. An extensive record was developed. In an ensuing opinion, 316 F. Supp. 271 (SDNY 1970), Judge Cooper first noted that:

> "Plaintiff's witnesses in the main concede that some form of reserve on players is a necessary element of the organization of baseball as a league sport, but contend that the present all-embracing system is needlessly restrictive and offer various alternatives which in their view might loosen the bonds without sacrifice to the game. . . .
>
> "Clearly the preponderance of credible proof does not favor elimination of the reserve clause. With the sole exception of plaintiff himself, it shows that even plaintiff's witnesses do not contend that it is wholly undesirable; in fact they regard substantial portions meritorious. . . ." 316 F. Supp., at 275–276.

He then held that *Federal Baseball Club* v. *National League*, 259 U. S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), were controlling; that it was not necessary to reach the issue whether exemption from the antitrust laws would result because aspects of

baseball now are a subject of collective bargaining; that the plaintiff's state law claims, those based on common law as well as on statute, were to be denied because baseball was not "a matter which admits of diversity of treatment," 316 F. Supp., at 280; that the involuntary servitude claim failed because of the absence of "the essential element of this cause of action, a showing of compulsory service," 316 F. Supp., at 281–282; and that judgment was to be entered for the defendants. Judge Cooper included a statement of personal conviction to the effect that "negotiations could produce an accommodation on the reserve system which would be eminently fair and equitable to all concerned" and that "the reserve clause can be fashioned so as to find acceptance by player and club." 316 F. Supp., at 282 and 284.

On appeal, the Second Circuit felt "compelled to affirm." 443 F. 2d 264, 265 (1971). It regarded the issue of state law as one of first impression, but concluded that the Commerce Clause precluded its application. Judge Moore added a concurring opinion in which he predicted, with respect to the suggested overruling of *Federal Baseball* and *Toolson*, that "there is no likelihood that such an event will occur."[9] 443 F. 2d, at 268, 272.

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[9] "And properly so. Baseball's welfare and future should not be for politically insulated interpreters of technical antitrust statutes but rather should be for the voters through their elected representatives. If baseball is to be damaged by statutory regulation, let the congressman face his constituents the next November and also face the consequences of his baseball voting record." 443 F. 2d, at 272.

Cf. Judge Friendly's comments in *Salerno* v. *American League*, 429 F. 2d 1003, 1005 (CA2 1970), cert. denied, *sub nom. Salerno* v. *Kuhn*, 400 U. S. 1001 (1971):

"We freely acknowledge our belief that *Federal Baseball* was not one of Mr. Justice Holmes' happiest days, that the rationale of *Toolson* is extremely dubious and that, to use the Supreme Court's

We granted certiorari in order to look once again at this troublesome and unusual situation. 404 U. S. 880 (1971).

IV

The Legal Background

A. *Federal Baseball Club* v. *National League*, 259 U. S. 200 (1922), was a suit for treble damages instituted by a member of the Federal League (Baltimore) against the National and American Leagues and others. The plaintiff obtained a verdict in the trial court, but the Court of Appeals reversed. The main brief filed by the plaintiff with this Court discloses that it was strenuously argued, among other things, that the business in which the defendants were engaged was interstate commerce; that the interstate relationship among the several clubs, located as they were in different States, was predominant; that organized baseball represented an investment of colossal wealth; that it was an engagement in moneymaking; that gate receipts were divided by agreement between the home club and the visiting club; and that the business of baseball was to be distinguished from the mere playing of the game as a sport for physical exercise and diversion. See also 259 U. S., at 201–206.

Mr. Justice Holmes, in speaking succinctly for a unanimous Court, said:

> "The business is giving exhibitions of base ball, which are purely state affairs. . . . But the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and

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own adjectives, the distinction between baseball and other professional sports is 'unrealistic,' 'inconsistent' and 'illogical.' . . . While we should not fall out of our chairs with surprise at the news that *Federal Baseball* and *Toolson* had been overruled, we are not at all certain the Court is ready to give them a happy despatch."

must arrange and pay for their doing so is not enough to change the character of the business. . . . [T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words. As it is put by the defendants, personal effort, not related to production, is not a subject of commerce. That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.

"If we are right the plaintiff's business is to be described in the same way and the restrictions by contract that prevented the plaintiff from getting players to break their bargains and the other conduct charged against the defendants were not an interference with commerce among the States." 259 U. S., at 208–209.[10]

[10] "What really saved baseball, legally at least, for the next half century was the protective canopy spread over it by the United States Supreme Court's decision in the Baltimore Federal League anti-trust suit against Organized Baseball in 1922. In it Justice Holmes, speaking for a unanimous court, ruled that the business of giving baseball exhibitions for profit was not 'trade or commerce in the commonly-accepted use of those words' because 'personal effort, not related to production, is not a subject of commerce'; nor was it interstate, because the movement of ball clubs across state lines was merely 'incidental' to the business. It should be noted that, contrary to what many believe, Holmes did call baseball a business; time and again those who have not troubled to read the text of the decision have claimed incorrectly that the court said baseball was a sport and not a business." 2 H. Seymour, Baseball 420 (1971).

The Court thus chose not to be persuaded by opposing examples proffered by the plaintiff, among them (a) Judge Learned Hand's decision on a demurrer to a Sherman Act complaint with respect to vaudeville entertainers traveling a theater circuit covering several States, *H. B. Marienelli, Ltd.* v. *United Booking Offices,* 227 F. 165 (SDNY 1914); (b) the first Mr. Justice Harlan's opinion in *International Textbook Co.* v. *Pigg,* 217 U. S. 91 (1910), to the effect that correspondence courses pursued through the mail constituted commerce among the States; and (c) Mr. Justice Holmes' own opinion, for another unanimous Court, on demurrer in a Sherman Act case, relating to cattle shipment, the interstate movement of which was interrupted for the finding of purchasers at the stockyards, *Swift & Co.* v. *United States,* 196 U. S. 375 (1905). The only earlier case the parties were able to locate where the question was raised whether organized baseball was within the Sherman Act was *American League Baseball Club* v. *Chase;* 86 Misc. 441, 149 N. Y. S. 6 (1914). That court had answered the question in the negative.

B. *Federal Baseball* was cited a year later, and without disfavor, in another opinion by Mr. Justice Holmes for a unanimous Court. The complaint charged antitrust violations with respect to vaudeville bookings. It was held, however, that the claim was not frivolous and that the bill should not have been dismissed. *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271 (1923).[11]

It has also been cited, not unfavorably, with respect to the practice of law, *United States* v. *South-Eastern*

[11] On remand of the *Hart* case the trial court dismissed the complaint at the close of the evidence. The Second Circuit affirmed on the ground that the plaintiff's evidence failed to establish that the interstate transportation was more than incidental. 12 F. 2d 341 (1926). This Court denied certiorari, 273 U. S. 703 (1926).

Underwriters Assn., 322 U. S. 533, 573 (1944) (Stone, C. J., dissenting); with respect to out-of-state contractors, *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 196–197 (1954) (Minton, J., dissenting); and upon a general comparison reference, *North American Co.* v. *SEC*, 327 U. S. 686, 694 (1946).

In the years that followed, baseball continued to be subject to intermittent antitrust attack. The courts, however, rejected these challenges on the authority of *Federal Baseball*. In some cases stress was laid, although unsuccessfully, on new factors such as the development of radio and television with their substantial additional revenues to baseball.[12] For the most part, however, the Holmes opinion was generally and necessarily accepted as controlling authority.[13] And in the 1952 Report of the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H. R. Rep. No. 2002, 82d Cong., 2d Sess., 229, it was said, in conclusion:

> "On the other hand the overwhelming preponderance of the evidence established baseball's need for some sort of reserve clause. Baseball's history shows that chaotic conditions prevailed when there was no reserve clause. Experience points to no feasible substitute to protect the integrity of the game or to guarantee a comparatively even com-

[12] *Toolson* v. *New York Yankees, Inc.*, 101 F. Supp. 93 (SD Cal. 1951), aff'd, 200 F. 2d 198 (CA9 1952); *Kowalski* v. *Chandler*, 202 F. 2d 413 (CA6 1953). See *Salerno* v. *American League*, 429 F. 2d 1003 (CA2 1970), cert. denied, *sub nom. Salerno* v. *Kuhn*, 400 U. S. 1001 (1971). But cf. *Gardella* v. *Chandler*, 172 F. 2d 402 (CA2 1949) (this case, we are advised, was subsequently settled); *Martin* v. *National League Baseball Club*, 174 F. 2d 917 (CA2 1949).

[13] *Corbett* v. *Chandler*, 202 F. 2d 428 (CA6 1953); *Portland Baseball Club, Inc.* v. *Baltimore Baseball Club, Inc.*, 282 F. 2d 680 (CA9 1960); *Niemiec* v. *Seattle Rainier Baseball Club, Inc.*, 67 F. Supp. 705 (WD Wash. 1946). See *State* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N. W. 2d 1, cert. denied, 385 U. S. 990 (1966).

> petitive struggle. The evidence adduced at the hearings would clearly not justify the enactment of legislation flatly condemning the reserve clause."

C. The Court granted certiorari, 345 U. S. 963 (1953), in the *Toolson, Kowalski,* and *Corbett* cases, cited in nn. 12 and 13, *supra,* and, by a short *per curiam* (Warren, C. J., and Black, Frankfurter, DOUGLAS, Jackson, Clark, and Minton, JJ.), affirmed the judgments of the respective courts of appeals in those three cases. *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356 (1953). *Federal Baseball* was cited as holding "that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws," 346 U. S., at 357, and:

> "Congress has had the ruling under consideration but has not seen fit to bring such business under these laws by legislation having prospective effect. The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation. Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Ibid.*

This quotation reveals four reasons for the Court's affirmance of *Toolson* and its companion cases: (a) Congressional awareness for three decades of the Court's

ruling in *Federal Baseball*, coupled with congressional inaction. (b) The fact that baseball was left alone to develop for that period upon the understanding that the reserve system was not subject to existing federal antitrust laws. (c) A reluctance to overrule *Federal Baseball* with consequent retroactive effect. (d) A professed desire that any needed remedy be provided by legislation rather than by court decree. The emphasis in *Toolson* was on the determination, attributed even to *Federal Baseball*, that Congress had no intention to include baseball within the reach of the federal antitrust laws. Two Justices, (Burton and Reed, JJ.) dissented, stressing the factual aspects, revenue sources, and the absence of an express exemption of organized baseball from the Sherman Act. 346 U. S., at 357. The 1952 congressional study was mentioned. *Id.*, at 358, 359, 361.

It is of interest to note that in *Toolson* the petitioner had argued flatly that *Federal Baseball* "is wrong and must be overruled," Brief 19, and that Thomas Reed Powell, a constitutional scholar of no small stature, urged, as counsel for an *amicus*, that "baseball is a unique enterprise," Amicus Brief 2, and that "unbridled competition as applied to baseball would not be in the public interest." *Id.*, at 14.

D. *United States* v. *Shubert*, 348 U. S. 222 (1955), was a civil antitrust action against defendants engaged in the production of legitimate theatrical attractions throughout the United States and in operating theaters for the presentation of such attractions. The District Court had dismissed the complaint on the authority of *Federal Baseball* and *Toolson*. 120 F. Supp. 15 (SDNY 1953). This Court reversed. Mr. Chief Justice Warren noted the Court's broad conception of "trade or commerce" in the antitrust statutes and the types of enterprises already held to be within the reach of that phrase.

He stated that *Federal Baseball* and *Toolson* afforded no basis for a conclusion that businesses built around the performance of local exhibitions are exempt from the antitrust laws. 348 U. S., at 227. He then went on to elucidate the holding in *Toolson* by meticulously spelling out the factors mentioned above:

> "In *Federal Baseball*, the Court, speaking through Mr. Justice Holmes, was dealing with the business of baseball and nothing else. . . . The travel, the Court concluded, was 'a mere incident, not the essential thing.' . . .
>
> "In *Toolson*, where the issue was the same as in *Federal Baseball*, the Court was confronted with a unique combination of circumstances. For over 30 years there had stood a decision of this Court specifically fixing the status of the baseball business under the antitrust laws and more particularly the validity of the so-called 'reserve clause.' During this period, in reliance on the *Federal Baseball* precedent, the baseball business had grown and developed. . . . And Congress, although it had actively considered the ruling, had not seen fit to reject it by amendatory legislation. Against this background, the Court in *Toolson* was asked to overrule *Federal Baseball* on the ground that it was out of step with subsequent decisions reflecting present-day concepts of interstate commerce. The Court, in view of the circumstances of the case, declined to do so. But neither did the Court necessarily reaffirm all that was said in *Federal Baseball*. Instead, '[w]ithout re-examination of the underlying issues,' the Court adhered to *Federal Baseball* 'so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' 346

U. S., at 357. In short, *Toolson* was a narrow application of the rule of *stare decisis*.

". . . If the *Toolson* holding is to be expanded—or contracted—the appropriate remedy lies with Congress." 348 U. S., at 228–230.

E. *United States* v. *International Boxing Club*, 348 U. S. 236 (1955), was a companion to *Shubert* and was decided the same day. This was a civil antitrust action against defendants engaged in the business of promoting professional championship boxing contests. Here again the District Court had dismissed the complaint in reliance upon *Federal Baseball* and *Toolson*. The Chief Justice observed that "if it were not for *Federal Baseball* and *Toolson*, we think that it would be too clear for dispute that the Government's allegations bring the defendants within the scope of the Act." 348 U. S., at 240–241. He pointed out that the defendants relied on the two baseball cases but also would have been content with a more restrictive interpretation of them than the *Shubert* defendants, for the boxing defendants argued that the cases immunized only businesses that involve exhibitions of an athletic nature. The Court accepted neither argument. It again noted, 348 U. S., at 242, that *"Toolson* neither overruled *Federal Baseball* nor necessarily reaffirmed all that was said in *Federal Baseball*." It stated:

"The controlling consideration in *Federal Baseball* and *Hart* was, instead, a very practical one—the degree of interstate activity involved in the particular business under review. It follows that *stare decisis* cannot help the defendants here; for, contrary to their argument, *Federal Baseball* did not hold that all businesses based on professional sports were outside the scope of the antitrust laws. The issue confronting us is, therefore, not whether a previously granted exemption should continue,

but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve, not this Court." 348 U. S., at 243.

The Court noted the presence then in Congress of various bills forbidding the application of the antitrust laws to "organized professional sports enterprises"; the holding of extensive hearings on some of these; subcommittee opposition; a postponement recommendation as to baseball; and the fact that "Congress thus left intact the then-existing coverage of the antitrust laws." 348 U. S., at 243–244.

Mr. Justice Frankfurter, joined by Mr. Justice Minton, dissented. "It would baffle the subtlest ingenuity," he said, "to find a single differentiating factor between other sporting exhibitions . . . and baseball insofar as the conduct of the sport is relevant to the criteria or considerations by which the Sherman Law becomes applicable to a 'trade or commerce.'" 348 U. S., at 248. He went on:

"The Court decided as it did in the *Toolson* case as an application of the doctrine of *stare decisis*. That doctrine is not, to be sure, an imprisonment of reason. But neither is it a whimsy. It can hardly be that this Court gave a preferred position to baseball because it is the great American sport. . . . . If *stare decisis* be one aspect of law, as it is, to disregard it in identic situations is mere caprice.

"Congress, on the other hand, may yield to sentiment and be capricious, subject only to due process. . . .

"Between them, this case and *Shubert* illustrate that nice but rational distinctions are inevitable in adjudication. I agree with the Court's opinion in *Shubert* for precisely the reason that constrains me to dissent in this case." 348 U. S., at 249–250.

Mr. Justice Minton also separately dissented on the ground that boxing is not trade or commerce. He added the comment that "Congress has not attempted" to control baseball and boxing. 348 U. S., at 251, 253. The two dissenting Justices, thus, did not call for the overruling of *Federal Baseball* and *Toolson;* they merely felt that boxing should be under the same umbrella of freedom as was baseball and, as Mr. Justice Frankfurter said, 348 U. S., at 250, they could not exempt baseball "to the exclusion of every other sport different not one legal jot or tittle from it." [14]

F. The parade marched on. *Radovich* v. *National Football League,* 352 U. S. 445 (1957), was a civil Clayton Act case testing the application of the antitrust laws to professional football. The District Court dismissed. The Ninth Circuit affirmed in part on the basis of *Federal Baseball* and *Toolson.* The court did not hesitate to "confess that the strength of the pull" of the baseball cases and of *International Boxing* "is about equal," but then observed that "[f]ootball is a team sport" and boxing an individual one. 231 F. 2d 620, 622.

This Court reversed with an opinion by Mr. Justice Clark. He said that the Court made its ruling in *Toolson* "because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity." 352 U. S., at 450. He noted that Congress had not acted. He then said:

> "All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led the Court to the practical result that

[14] The case's final chapter is *International Boxing Club* v. *United States,* 358 U. S. 242 (1959).

it should sustain the unequivocal line of authority reaching over many years.

"[S]ince *Toolson* and *Federal Baseball* are still cited as controlling authority in antitrust actions involving other fields of business, we now specifically limit the rule there established to the facts there involved, *i. e.*, the business of organized professional baseball. As long as the Congress continues to acquiesce we should adhere to—but not extend—the interpretation of the Act made in those cases. . . .

"If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer, aside from the distinctions between the businesses, that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But *Federal Baseball* held the business of baseball outside the scope of the Act. No other business claiming the coverage of those cases has such an adjudication. We, therefore, conclude that the orderly way to eliminate error or discrimination, if any there be, is by legislation and not by court decision. Congressional processes are more accommodative, affording the whole industry hearings and an opportunity to assist in the formulation of new legislation. The resulting product is therefore more likely to protect the industry and the public alike. The whole scope of congressional action would be known long in advance and effective dates for the legislation could be set in the future without the injustices of retroactivity and surprise which might follow court action." 352 U. S., at 450–452 (footnote omitted).

Mr. Justice Frankfurter dissented essentially for the reasons stated in his dissent in *International Boxing,*

352 U. S., at 455. Mr. Justice Harlan, joined by MR. JUSTICE BRENNAN, also dissented because he, too, was "unable to distinguish football from baseball." 352 U. S., at 456. Here again the dissenting Justices did not call for the overruling of the baseball decisions. They merely could not distinguish the two sports and, out of respect for *stare decisis*, voted to affirm.

G. Finally, in *Haywood* v. *National Basketball Assn.*, 401 U. S. 1204 (1971), MR. JUSTICE DOUGLAS, in his capacity as Circuit Justice, reinstated a District Court's injunction *pendente lite* in favor of a professional basketball player and said, "Basketball . . . does not enjoy exemption from the antitrust laws." 401 U. S., at 1205.[15]

H. This series of decisions understandably spawned extensive commentary,[16] some of it mildly critical and

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[15] See also *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F. Supp. 1049, 1060 (CD Cal. 1971); *Washington Professional Basketball Corp.* v. *National Basketball Assn.*, 147 F. Supp. 154 (SDNY 1956).

[16] Neville, Baseball and the Antitrust Laws, 16 Fordham L. Rev. 208 (1947); Eckler, Baseball—Sport or Commerce?, 17 U. Chi. L. Rev. 56 (1949); Comment, Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws, 62 Yale L. J. 576 (1953); P. Gregory, The Baseball Player, An Economic Study, c. 19 (1956); Note, The Super Bowl and the Sherman Act: Professional Team Sports and the Antitrust Laws, 81 Harv. L. Rev. 418 (1967); The Supreme Court, 1953 Term, 68 Harv. L. Rev. 105, 136–138 (1954); The Supreme Court, 1956 Term, 71 Harv. L. Rev. 94, 170–173 (1957); Note, 32 Va. L. Rev. 1164 (1946); Note, 24 Notre Dame Law. 372 (1949); Note, 53 Col. L. Rev. 242 (1953); Note, 22 U. Kan. City L. Rev. 173 (1954); Note, 25 Miss. L. J. 270 (1954); Note, 29 N. Y. U. L. Rev. 213 (1954); Note, 105 U. Pa. L. Rev. 110 (1956); Note, 32 Texas L. Rev. 890 (1954); Note, 35 B. U. L. Rev. 447 (1955); Note, 57 Col. L. Rev. 725 (1957); Note, 23 Geo. Wash. L. Rev. 606 (1955); Note, 1 How. L. J. 281 (1955); Note, 26 Miss. L. J. 271 (1955); Note, 9 Sw. L. J. 369 (1955); Note, 29 Temple L. Q. 103 (1955); Note, 29 Tul. L. Rev. 793 (1955); Note, 62 Dick.

much of it not; nearly all of it looked to Congress for any remedy that might be deemed essential.

I. Legislative proposals have been numerous and persistent. Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball.[17] A few of these passed one house or the other. Those that did would have expanded, not restricted, the reserve system's exemption to other professional league sports. And the Act of September 30, 1961, Pub. L. 87–331, 75 Stat. 732, and the merger addition thereto effected by the Act of November 8, 1966, Pub. L. 89–800, § 6 (b),

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L. Rev. 96 (1957); Note, 11 Sw. L. J. 516 (1957); Note, 36 N. C. L. Rev. 315 (1958); Note, 35 Fordham L. Rev. 350 (1966); Note, 8 B. C. Ind. & Com. L. Rev. 341 (1967); Note, 13 Wayne L. Rev. 417 (1967); Note, 2 Rutgers-Camden L. J. 302 (1970); Note, 8 San Diego L. Rev. 92 (1970); Note, 12 B. C. Ind. & Com. L. Rev. 737 (1971); Note, 12 Wm. & Mary L. Rev. 859 (1971).

[17] Hearings on H. R. 5307 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess. (1957); Hearings on H. R. 10378 and S. 4070 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958); Hearings on H. R. 2370 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 1st Sess. (1959) (not printed); Hearings on S. 616 and S. 886 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959); Hearings on S. 3483 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 86th Cong., 2d Sess. (1960); Hearings on S. 2391 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. (1964); S. Rep. No. 1303, 88th Cong., 2d Sess. (1964); Hearings on S. 950 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965); S. Rep. No. 462, 89th Cong., 1st Sess. (1965). Bills introduced in the 92d Cong., 1st Sess., and bearing on the subject are S. 2599, S. 2616, H. R. 2305, H. R. 11033, and H. R. 10825.

80 Stat. 1515, 15 U. S. C. §§ 1291–1295, were also expansive rather than restrictive as to antitrust exemption.[18]

V

In view of all this, it seems appropriate now to say that:

1. Professional baseball is a business and it is engaged in interstate commerce.

2. With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball* and *Toolson* have become an aberration confined to baseball.

3. Even though others might regard this as "unrealistic, inconsistent, or illogical," see *Radovich*, 352 U. S., at 452, the aberration is an established one, and one that has been recognized not only in *Federal Baseball* and *Toolson*, but in *Shubert*, *International Boxing*, and *Radovich*, as well, a total of five consecutive cases in this Court. It is an aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*, and one that has survived the Court's expanding concept of interstate commerce. It rests on a recognition and an acceptance of baseball's unique characteristics and needs.

4. Other professional sports operating interstate—foot-

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[18] Title 15 U. S. C. 1294 reads:

"Nothing contained in this chapter shall be deemed to change, determine, or otherwise affect the *applicability* or *nonapplicability* of the antitrust laws to any act, contract, agreement, rule, course of conduct, or other activity by, between, or among persons engaging in, conducting, or participating in the organized professional team sports of football, baseball, basketball, or hockey, except the agreements to which section 1291 of this title shall apply." (Emphasis supplied.)

ball, boxing, basketball, and, presumably, hockey [19] and golf [20]—are not so exempt.

5. The advent of radio and television; with their consequent increased coverage and additional revenues, has not occasioned an overruling of *Federal Baseball* and *Toolson.*

6. The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court, accordingly, has concluded that Congress as yet has had no intention to subject baseball's reserve system to the reach of the antitrust statutes. This, obviously, has been deemed to be something other than mere congressional silence and passivity. Cf. *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U. S. 235, 241–242 (1970).

7. The Court has expressed concern about the confusion and the retroactivity problems that inevitably would result with a judicial overturning of *Federal Baseball.* It has voiced a preference that if any change is to be made, it come by legislative action that, by its nature, is only prospective in operation.

8. The Court noted in *Radovich,* 352 U. S., at 452, that the slate with respect to baseball is not clean. Indeed, it has not been clean for half a century.

This emphasis and this concern are still with us. We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson,* to overturn those cases judicially when Congress, by its positive inaction,

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[19] *Peto* v. *Madison Square Garden Corp.,* 1958 Trade Cases, ¶ 69,106 (SDNY 1958).

[20] *Deesen* v. *Professional Golfers' Assn.,* 358 F. 2d 165 (CA9), cert. denied, 385 U. S. 846 (1966).

has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.

Accordingly, we adhere once again to *Federal Baseball* and *Toolson* and to their application to professional baseball. We adhere also to *International Boxing* and *Radovich* and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in *Toolson* and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.

The petitioner's argument as to the application of state antitrust laws deserves a word. Judge Cooper rejected the state law claims because state antitrust regulation would conflict with federal policy and because national "uniformity [is required] in any regulation of baseball and its reserve system." 316 F. Supp., at 280. The Court of Appeals, in affirming, stated, "[A]s the burden on interstate commerce outweighs the states' interests in regulating baseball's reserve system, the Commerce Clause precludes the application here of state antitrust law." 443 F. 2d, at 268. As applied to organized baseball, and in the light of this Court's observations and holdings in *Federal Baseball*, in *Toolson*, in *Shubert*, in *International Boxing*, and in *Radovich*, and despite baseball's allegedly inconsistent position taken in the past with respect to the application of state law,[21]

[21] See Respondent's Brief 67 in *Federal Baseball* and Respondent's Brief 30 in *Toolson*. See also *State* v. *Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N. W. 2d 1, cert. denied, 385 U. S. 990 (1966).

these statements adequately dispose of the state law claims.

The conclusion we have reached makes it unnecessary for us to consider the respondents' additional argument that the reserve system is a mandatory subject of collective bargaining and that federal labor policy therefore exempts the reserve system from the operation of federal antitrust laws.[22]

We repeat for this case what was said in *Toolson:*

> "Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball Club of Baltimore* v. *National League of Professional Baseball Clubs, supra,* so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U. S., at 357.

And what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action.

The judgment of the Court of Appeals is

Affirmed.

THE CHIEF JUSTICE and MR. JUSTICE WHITE join in the judgment of the Court, and in all but Part I of the Court's opinion.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

MR. CHIEF JUSTICE BURGER, concurring.

I concur in all but Part I of the Court's opinion but, like MR. JUSTICE DOUGLAS, I have grave reservations

[22] See Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971), suggesting present-day irrelevancy of the antitrust issue.

as to the correctness of *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953); as he notes in his dissent, he joined that holding but has "lived to regret it." The error, if such it be, is one on which the affairs of a great many people have rested for a long time. Courts are not the forum in which this tangled web ought to be unsnarled. I agree with MR. JUSTICE DOUGLAS that congressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time the Congress acted to solve this problem.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

This Court's decision in *Federal Baseball Club* v. *National League*, 259 U. S. 200, made in 1922, is a derelict in the stream of the law that we, its creator, should remove. Only a romantic view[1] of a rather dismal business account over the last 50 years would keep that derelict in midstream.

In 1922 the Court had a narrow, parochial view of commerce. With the demise of the old landmarks of that era, particularly *United States* v. *Knight Co.*, 156 U. S. 1, *Hammer* v. *Dagenhart*, 247 U. S. 251, and *Paul* v. *Virginia*, 8 Wall. 168, the whole concept of commerce has changed.

Under the modern decisions such as *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219; *United States* v. *Darby*, 312 U. S. 100; *Wickard* v. *Filburn*, 317 U. S. 111; *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, the power of Congress was recognized as broad enough to reach all phases of the vast operations of our national industrial system.

[1] While I joined the Court's opinion in *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356, I have lived to regret it; and I would now correct what I believe to be its fundamental error.

An industry so dependent on radio and television as is baseball and gleaning vast interstate revenues (see H. R. Rep. No. 2002, 82d Cong., 2d Sess., 4, 5 (1952)) would be hard put today to say with the Court in the *Federal Baseball Club* case that baseball was only a local exhibition, not trade or commerce.

Baseball is today big business that is packaged with beer, with broadcasting, and with other industries. The beneficiaries of the *Federal Baseball Club* decision are not the Babe Ruths, Ty Cobbs, and Lou Gehrigs.

The owners, whose records many say reveal a proclivity for predatory practices, do not come to us with equities. The equities are with the victims of the reserve clause. I use the word "victims" in the Sherman Act sense, since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade.[2] *Gardella* v. *Chandler*, 172 F. 2d 402 (CA2). And see *Haywood* v. *National Basketball Assn.*, 401 U. S. 1204 (DOUGLAS, J., in chambers).

If congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation.[3] H. R. Rep. No. 2002, 82d Cong., 2d Sess.

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[2] Had this same group boycott occurred in another industry, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207; *United States* v. *Shubert*, 348 U. S. 222; or even in another sport, *Haywood* v. *National Basketball Assn.*, 401 U. S. 1204 (DOUGLAS, J., in chambers); *Radovich* v. *National Football League*, 352 U. S. 445; *United States* v. *International Boxing Club*, 348 U. S. 236; we would have no difficulty in sustaining petitioner's claim.

[3] The Court's reliance upon congressional inaction disregards the wisdom of *Helvering* v. *Hallock*, 309 U. S. 106, 119–121, where we said:

"Nor does want of specific Congressional repudiations . . . serve as an implied instruction by Congress to us not to reconsider, in the light of new experience . . . those decisions . . . . It would require very persuasive circumstances enveloping Congressional silence to

(1952). The only statutory exemption granted by Congress to professional sports concerns broadcasting rights. 15 U. S. C. §§ 1291–1295. I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly.

There can be no doubt "that were we considering the question of baseball for the first time upon a clean slate" [4] we would hold it to be subject to federal antitrust regulation. *Radovich* v. *National Football League*, 352 U. S. 445, 452. The unbroken silence of Congress should not prevent us from correcting our own mistakes.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner was a major league baseball player from 1956, when he signed a contract with the Cincinnati Reds, until 1969, when his 12-year career with the St. Louis Cardinals, who had obtained him from the Reds, ended and he was traded to the Philadelphia Phillies. He had no notice that the Cardinals were contemplating a trade, no opportunity to indicate the teams with which he would prefer playing, and no desire to go to Philadelphia. After receiving formal notification of the trade, petitioner wrote to the Commissioner of Baseball protesting that he was not

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debar this Court from re-examining its own doctrines. . . . Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

And see *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 556–561.

[4] This case gives us for the first time a full record showing the reserve clause in actual operation.

"a piece of property to be bought and sold irrespective of my wishes,"[1] and urging that he had the right to consider offers from other teams than the Phillies. He requested that the Commissioner inform all of the major league teams that he was available for the 1970 season. His request was denied, and petitioner was informed that he had no choice but to play for Philadelphia or not to play at all.

To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that it was not servitude that bound petitioner to the club owners; it was the reserve system. The essence of that system is that a player is bound to the club with which he first signs a contract for the rest of his playing days.[2] He cannot escape from the club except by retiring, and he cannot prevent the club from assigning his contract to any other club.

Petitioner brought this action in the United States District Court for the Southern District of New York. He alleged, among other things, that the reserve system was an unreasonable restraint of trade in violation of

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[1] Letter from Curt Flood to Bowie K. Kuhn, December 24, 1969, App. 37.

[2] As MR. JUSTICE BLACKMUN points out, the reserve system is not novel. It has been employed since 1887. See *Metropolitan Exhibition Co.* v. *Ewing*, 42 F. 198, 202-204 (CC SDNY 1890). The club owners assert that it is necessary to preserve effective competition and to retain fan interest. The players do not agree and argue that the reserve system is overly restrictive. Before this lawsuit was instituted, the players refused to agree that the reserve system should be a part of the collective-bargaining contract. Instead, the owners and players agreed that the reserve system would temporarily remain in effect while they jointly investigated possible changes. Their activity along these lines has halted pending the outcome of this suit.

federal antitrust laws.[3] The District Court thought itself bound by prior decisions of this Court and found for the respondents after a full trial. 309 F. Supp. 793 (1970). The United States Court of Appeals for the Second Circuit affirmed. 443 F. 2d 264 (1971). We granted certiorari on October 19, 1971, 404 U. S. 880, in order to take a further look at the precedents relied upon by the lower courts.

This is a difficult case because we are torn between the principle of *stare decisis* and the knowledge that the decisions in *Federal Baseball Club* v. *National League*, 259 U. S. 200 (1922), and *Toolson* v. *New York Yankees, Inc.*, 346 U. S. 356 (1953), are totally at odds with more recent and better reasoned cases.

In *Federal Baseball Club*, a team in the Federal League brought an antitrust action against the National and American Leagues and others. In his opinion for a unanimous Court, Mr. Justice Holmes wrote that the business being considered was "giving exhibitions of base ball, which are purely state affairs." 259 U. S., at 208. Hence, the Court held that baseball was not within the purview of the antitrust laws. Thirty-one years later, the Court reaffirmed this decision, without reexamining it in *Toolson*, a one-paragraph *per curiam* opinion. Like this case, *Toolson* involved an attack on the reserve system. The Court said:

> "The business has . . . been left for thirty years to develop, on the understanding that it was not

[3] Petitioner also alleged a violation of state antitrust laws, state civil rights laws, and of the common law, and claimed that he was forced into peonage and involuntary servitude in violation of the Thirteenth Amendment to the United States Constitution. Because I believe that federal antitrust laws govern baseball, I find that state law has been pre-empted in this area. Like the lower courts, I do not believe that there has been a violation of the Thirteenth Amendment.

subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.*, at 357.

Much more time has passed since *Toolson* and Congress has not acted. We must now decide whether to adhere to the reasoning of *Toolson*—*i. e.*, to refuse to re-examine the underlying basis of *Federal Baseball Club*—or to proceed with a re-examination and let the chips fall where they may.

In his answer to petitioner's complaint, the Commissioner of Baseball "admits that under present concepts of interstate commerce defendants are engaged therein." App. 40. There can be no doubt that the admission is warranted by today's reality. Since baseball is interstate commerce, if we re-examine baseball's antitrust exemption, the Court's decisions in *United States* v. *Shubert*, 348 U. S. 222 (1955), *United States* v. *International Boxing Club*, 348 U. S. 236 (1955), and *Radovich* v. *National Football League*, 352 U. S. 445 (1957), require that we bring baseball within the coverage of the antitrust laws. See also, *Haywood* v. *National Basketball Assn.*, 401 U. S. 1204 (DOUGLAS, J., in chambers).

We have only recently had occasion to comment that:

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. . . . Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy

> because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy." *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as they are to football players, lawyers, doctors, or members of any other class of workers. Baseball players cannot be denied the benefits of competition merely because club owners view other economic interests as being more important, unless Congress says so.

Has Congress acquiesced in our decisions in *Federal Baseball Club* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the Court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson* the Court refused to act because Congress had been silent. But the Court may have read too much into this legislative inaction.

Americans love baseball as they love all sports. Perhaps we become so enamored of athletics that we assume that they are foremost in the minds of legislators as well as fans. We must not forget, however, that there are only some 600 major league baseball players. Whatever muscle they might have been able to muster by combining forces with other athletes has been greatly impaired by the manner in which this Court has isolated them. It is this Court that has made them impotent, and this Court should correct its error.

We do not lightly overrule our prior constructions of federal statutes, but when our errors deny substantial federal rights, like the right to compete freely and effectively to the best of one's ability as guaranteed by the

antitrust laws, we must admit our error and correct it. We have done so before and we should do so again here. See, *e. g.*, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313 (1971); *Boys Market, Inc.* v. *Retail Clerks Union*, 398 U. S. 235, 241 (1970).[4]

To the extent that there is concern over any reliance interests that club owners may assert, they can be satisfied by making our decision prospective only. Baseball should be covered by the antitrust laws beginning with this case and henceforth, unless Congress decides otherwise.[5]

Accordingly, I would overrule *Federal Baseball Club* and *Toolson* and reverse the decision of the Court of Appeals.[6]

This does not mean that petitioner would necessarily prevail, however. Lurking in the background is a hurdle of recent vintage that petitioner still must overcome.

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[4] In the past this Court has not hesitated to change its view as to what constitutes interstate commerce. Compare *United States* v. *Knight Co.*, 156 U. S. 1 (1895), with *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948), and *United States* v. *Darby*, 312 U. S. 100 (1941).

"The jurist concerned with 'public confidence in, and acceptance of the judicial system' might well consider that, however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice as it is, operates, so far as it is known, to diminish respect for the courts and for law itself." Szanton, Stare Decisis; A Dissenting View, 10 Hastings L. J. 394, 397 (1959).

[5] We said recently that "[i]n rare cases, decisions construing federal statutes might be denied full retroactive effect, as for instance where this Court overrules its own construction of a statute . . ." *United States* v. *Estate of Donnelly*, 397 U. S. 286, 295 (1970). Cf. *Simpson* v. *Union Oil Co. of California*, 377 U. S. 13, 25 (1964).

[6] The lower courts did not reach the question of whether, assuming the antitrust laws apply, they have been violated. This should be considered on remand.

In 1966, the Major League Players Association was formed. It is the collective-bargaining representative for all major league baseball players. Respondents argue that the reserve system is now part and parcel of the collective-bargaining agreement and that because it is a mandatory subject of bargaining, the federal labor statutes are applicable, not the federal antitrust laws.[1] The lower courts did not rule on this argument, having decided the case solely on the basis of the antitrust exemption.

This Court has faced the interrelationship between the antitrust laws and the labor laws before. The decisions make several things clear. First, "benefits to organized labor cannot be utilized as a cat's-paw to pull employer's chestnuts out of the antitrust fires." *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464 (1949). See also, *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797 (1945). Second, the very nature of a collective-bargaining agreement mandates that the parties be able to "restrain" trade to a greater degree than management could do unilaterally. *United States* v. *Hutcheson*, 312 U. S. 219 (1941); *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965); *Amalgamated Meat Cutters* v. *Jewel Tea*, 381 U. S. 676 (1965); cf., *Teamsters Union* v. *Oliver*, 358 U. S. 283 (1959). Finally, it is clear that some cases can be resolved only by examining the purposes and the competing interests of the labor and antitrust statutes and by striking a balance.

It is apparent that none of the prior cases is precisely in point. They involve union-management agreements that work to the detriment of management's competitors. In this case, petitioner urges that the reserve system works to the detriment of labor.

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[1] Cf. *United States* v. *Hutcheson*, 312 U. S. 219 (1941).

While there was evidence at trial concerning the collective-bargaining relationship of the parties, the issues surrounding that relationship have not been fully explored. As one commentator has suggested, this case "has been litigated with the implications for the institution of collective bargaining only dimly perceived. The labor law issues have been in the corners of the case—the courts below, for example, did not reach them—moving in and out of the shadows like an uninvited guest at a party whom one can't decide either to embrace or expel."[*]

It is true that in *Radovich* v. *National Football League*, *supra*, the Court rejected a claim that federal labor statutes governed the relationship between a professional athlete and the professional sport. But, an examination of the briefs and record in that case indicates that the issue was not squarely faced. The issue is once again before this Court without being clearly focused. It should, therefore, be the subject of further inquiry in the District Court.

There is a surface appeal to respondents' argument that petitioner's sole remedy lies in filing a claim with the National Labor Relations Board, but this argument is premised on the notion that management and labor have agreed to accept the reserve clause. This notion is contradicted, in part, by the record in this case. Petitioner suggests that the reserve system was thrust upon the players by the owners and that the recently formed players' union has not had time to modify or eradicate it. If this is true, the question arises as to whether there would then be any exemption from the antitrust laws in this case. Petitioner also suggests that there are limits

[*] Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1, 22 (1971).

to the antitrust violations to which labor and management can agree. These limits should also be explored.

In light of these considerations, I would remand this case to the District Court for consideration of whether petitioner can state a claim under the antitrust laws despite the collective-bargaining agreement, and, if so, for a determination of whether there has been an antitrust violation in this case.